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No. 351

In the Supreme Court of the United States

OCTOBER TERM, 1948

COSMOPOLITAN SHIPPING COMPANY, INC.,
PETITIONER

v.

ROBERT A. MCALLISTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The District Court did not enter an opinion. The opinion of the United States Court of Appeals for the Second Circuit (R. 638) is reported at 169 F. 2d 4.

JURISDICTION

The judgment of the Court of Appeals was entered July 23, 1948 (R. 645). The petition for certiorari was filed on October 14, 1948, and was granted on November 22, 1948.[1] The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

[1] On the same day, this Court also granted certiorari in No. 360, *Fink* v. *Shepard SS. Co.*, and No. 430, *Gaynor* v.

QUESTION PRESENTED

During World War II the United States, on the organization of the War Shipping Administration in February 1942, took over the direct physical operation of the government-owned merchant fleet. It terminated the various bare-boat charters under which the Maritime Commission had demised the Government's vessels for private operation by charterers who, as owners *pro hac vice* in possession and control, manned, navigated and physically managed the vessels as their own. It replaced this prior peacetime method of private operation by direct government operation of the vessels, employing three independent types of agents, among whom it distributed the various

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Agwilines, Inc., and set those cases down for hearing following No. 179, *Weade* v. *Dichmann, Wright & Pugh*, in which certiorai had already been granted and which also involved the question of the liability of general agents of the former War Shipping Administration. The Solicitor General appears for petitioner in this case and for respondents in the other cases because, in accordance with the wartime general agency agreement between petitioner and the War Shipping Administration, the United States is obligated for any recovery effected to the extend not covered by insurance (W. S. A. Form GAA 4-4-42 (R. 608)). On the standard form insurance which is obtained, the United States in effect assumes the reinsurance of the most substantial part of all losses. House Merchant Marine and Fisheries Committee Doc. No. 4, *Compilation of Standard Contract Forms of the War Shipping Administration*, p. 847. The defense of such actions is assumed by the Department of Justice whenever it appears to be required by the public importance of the question involved.

operating duties. As its agents afloat, to man, navigate and physically manage, and operate the vessels, the War Shipping Administration employed experienced ship masters, officers and crews, who were subject to its exclusive control and were technically unclassified civil service employees of the United States. As its agents ashore, to operate the accounting and certain other shoreside business of the vessels, it employed experienced shipping operators as ships' husbands or general agents, but excluded them from any authority or control over the operation of the vessels themselves and the masters, officers and crews by whom the Government directly manned, navigated, managed and operated its vessels. As agents to manage and conduct the loading of cargo and to render other berth and port services to its vessels, it employed shipping operators having existing berthing and stevedoring facilities. Various third parties, such as crew members, longshoremen and passengers, injured as a result of the negligence of the Government's masters and crews in the navigation and management of its vessels, have brought suit against the shoreside business agents.

The question for decision is whether, with respect to causes of action arising after the effective date of the War Shipping Administration (Clarification) Act of March 24, 1943, these shoreside business agents, such as petitioner here, are liable to third parties, such as respondent, for the acts of the Govern-

ment's civil service master and crew in doing work which was not assigned to such shoreside agents nor subject to their authority or control, but was exclusively work which the United States, as disclosed principal operating the vessels, had assigned to the master as its independent agent and employee.[2]

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved, *i. e.*, the War Shipping Administration (Clarification) Act (57 Stat. 45; 50 U. S. C. App. 1291), the Jones Act (41 Stat. 1007; 46 U. S. C. 688), the Federal Employers' Liability Act (35 Stat. 65, as amended; 45 U. S. C. 51) and R. S. 1753 (46 U. S. C. 631), together with certain applicable Civil Service Rules and War Shipping Administration Operations Regulations, are set forth in Appendices A and C, *infra*, pp. 135–141, 171–176.

STATEMENT

Respondent Robert A. McAllister signed shipping articles on July 23, 1945, with the master of the S. S. *Edward B. Haines* for a foreign voyage, in the capacity of second assistant engineer (R. 606). The *Haines* was a vessel built and owned by the United States and was operated by the War Shipping Administration (R. 624).

[2] The question has been restated in general terms so as to cover the fundamental question which this Court must decide in disposing of the *Fink* and *Gaynor* cases as well as this case, and could reach in the *Weade* case.

Petitioner Cosmopolitan Shipping Company was employed by the United States, under the wartime standard form of agency agreement GAA 4-4-42, as a ship's husband or general agent to operate the accounting and certain other shoreside business of the *Haines* and other government-operated vessels "in accordance with such directions, orders, or regulations" as the Government might prescribe (R. 358–359; Ex. G, R. 608).[3]

The articles on which respondent was employed bore the endorsement "YOU ARE BEING EMPLOYED BY THE UNITED STATES" and expressly identified petitioner as its agent (R. 358–365; Ex. A, R. 606). Similarly, the collective bargaining agreement under which respondent was thus employed by the United States was between the War Shipping Administration, represented by petitioner as its general agent, on the one hand, and the National Marine Engineers' Beneficial Association, representing respondent as his authorized collective bargaining representative, on the other (R. 586, 604). The agreement expressly recited that it was entered into "in compliance with the direction of the Administrator, War Shipping Administration," applied to all vessels "operated by the War Shipping Administration and allocated under a Gen-

[3] The form of agreement was in all essential respects the same as that which was before the Court in *Caldarola* v. *Eckert*, 332 U. S. 155. It was authorized by General Order 21 of the War Shipping Administration issued September 22, 1942, 7 F. R. 7561, and also appears in full text in 46 C. F. R. Cum. Supp. sec. 306.41.

eral Agency Agreement to said General Agent," and provided that the United States, as owner, "shall have the right to select his own employee provided such employee is a member of the Marine Engineers' Beneficial Association in good standing" and that "Nothing in this agreement shall prevent the owner from discharging any licensed engineer officer who is not satisfactory to it" (R. 586–587). By virtue of this government employment on a government-operated vessel, respondent's technical status was that of an unclassified civil-service employee of the United States. Civil Service Rules, Schedule A, sec. xxi (1).[4]

Petitioner procured McAllister from his union hiring hall for employment by the master of the *Haines* on behalf of the United States in accordance with the cited requirements of the collective bargaining agreement and Article 3A (d) of the agency agreement (R. 104–109, 477–478, 489, 85).[5] From the time the *Haines* left New

[4] 5 C. F. R., 1943 Cum. Supp., p. 1488, sec. 50.21 (Ex. O. 9004, 7 F. R. 2, 8; Ex. O. 9054, 7 F. R. 837). See also War Shipping Administration Operations Regulations No. 12, Supplement 1, Appendix A, *infra*, pp. 139–141.

[5] "The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by

York with a cargo for the Army at Shanghai until her return to the United States, petitioner had no further control over her, and in China, where the events giving rise to respondent's claim occurred, petitioner had no representatives and the vessel's local shoreside business was operated exclusively by employees of the Army and the War Shipping Administration (R. 59, 371–372, 376).

Upon the vessel's arrival at Shanghai on September 26, 1945, the master posted notices that an epidemic of polio as well as other diseases prevailed and directed the crew when ashore to eat only in special places and not to mix with the Chinese (R. 29–33, 68–69, 331). Respondent was allowed to go ashore almost daily in Shanghai between September 26 and November 1, 1945, but there is no evidence that he became infected there (R. 196–197). Various natives were sent aboard at Shanghai to unload the vessel during the period from her arrival until November 1, 1945, and as passengers on trips to Hongkong from November 1–5 and to Tsingtao from November 23–28. These natives, although provided with separate toilet facilities, were not prevented from using the com-

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the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder."

mon toilet and drinking fountain facilities of the vessel (R. 33–39, 59–61, 331–334). Chinese cooks for the Chinese passengers were also permitted to use the same cooking utensils and handle the same food as the vessel's other cooks (R. 38–39).

Respondent began to feel ill November 11, 1945, on the vessel's return to Shanghai from Hongkong, but did not report sick until November 24, 1945, the day after leaving Shanghai for Tsingtao. As early as November 22, 1945, however, there was reason for the master and officers of the *Haines* to believe respondent might have a serious disease such as polio, but no steps were taken to procure proper diagnosis and treatment before the vessel left Shanghai on November 23, 1945 (R. 40–50, 67–72, 95–97, 112, 116, 120–127, 198, 328–330, 335). It was only after the vessel docked at Tsingtao on November 28, 1945, that arrangements were made to transfer respondent ashore on November 30, where correct diagnosis was made and treatment begun (R. 60, 80–82, 84, 131). As a result of the polio infection respondent suffered injury of a permanent character. Respondent's medical experts testified that he could have been infected from the Chinese who came aboard and that he might have been prejudiced by the delay in commencing treatment.

Respondent did not sue the United States, but filed a complaint at law against petitioner alone, alleging that petitioner operated the *Haines*

under a general agency agreement; that respondent "was in the employ of" petitioner and was entitled to maintain the action against petitioner under the Jones Act; that respondent suffered injury by the negligence of petitioner and of the officers and fellow seamen aboard the vessel, more particularly in taking Chinese citizens aboard without physical examination and without taking adequate sanitary precautions for the safety of respondent and by failing to provide respondent prompt and proper medical care; and that by reason thereof respondent was injured to his damage in the sum of $250,000 (R. 3–5). The complaint added a second cause of action for maintenance and cure under the general maritime law in the amount of $25,000 (R. 5–6). Petitioner answered, denying liability (R. 6–7), and after a trial lasting six days, the district court left the case to the jury under instructions which authorized a verdict against petitioner for the negligence of the Government's master, officers and crew (R. 538). The jury found a verdict for respondent for $100,000 on the Jones Act count, but found for the petitioner on the question of maintenance and cure (R. 557). Motions to dismiss the complaint, to set aside the verdict for respondent, and for a new trial were denied by the district court (R. 631). On appeal, the judgment was affirmed by the court below in reliance, so far as concerns the issue presented here, upon this Court's decision in *Hust* v.

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Moore-McCormack Lines, 328 U. S. 707 (R. 638–645).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the Second Circuit erred:

1. In failing to hold that in order to recover from petitioner in a statutory action under the Jones Act, respondent was required to establish negligence on the part of some person who was doing the work of petitioner or was subject to petitioner's authority or control.

2. In holding that petitioner was liable to respondent for the negligence of his fellow officers who were neither subject to petitioner's orders nor doing work over which petitioner had any authority or control.

3. In holding that because petitioner was the "employer" of an injured seaman, within the meaning of the Jones Act, and respondent thus could bring the statutory action against petitioner as such an "employer," petitioner was liable in such an action for the negligence of respondent's fellow officers in doing work of the United States over which petitioner had no authority or control.

4. In holding that respondent's right to bring the statutory action under the Jones Act against petitioner was conclusive of the different question of whether petitioner was liable for the negligence of respondent's fellow officers in doing work over which petitioner had no authority or control.

5. In failing to hold that, in a case arising subsequent to the effective date of the War Shipping Administration (Clarification) Act of March 24, 1943, 57 Stat. 45, 50, 50 U. S. C. App. 1291, this suit is one against the United States to which the United States has not consented.

6. In holding that *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, was controlling in a case which arose subsequent to the enactment of the Classification Act.

7. In failing to hold that *Brady* v. *Roosevelt S. S. Co.,* 317 U. S. 575, 584–585, and *Caldarola* v. *Eckert,* 332 U. S. 155, 159, were controlling in the absence of any evidence that petitioner had or exercised any possession or control of the Government's vessel.

8. In affirming the judgment of the district court holding petitioner liable to respondent.

SUMMARY OF ARGUMENT

I

The issue in this case, as in No. 360, *Fink* v. *Shepard S. S. Co.,* No. 430, *Gaynor* v. *Agwilines,* and No. 179, *Weade* v. *Dickmann, Wright & Pugh,* is the reach of this Court's decision in *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, where it was held that an employee of the United States, serving as a seaman on a vessel held to have been operated by Moore-McCormack for the War Shipping Administration, could recover damages for personal injuries in a suit against Moore-McCor-

mack. The importance to the United States of the reach of the *Hust* decision rests upon the possible effect on its sovereign immunity from foreign and local interference in so far as the operations of its vessels are concerned. In time of national emergency, it is essential that the merchant fleet be operated directly by the Government, both for reasons of control and for secrecy. Yet if masters and crews of government-operated vessels are considered, under the general agency agreements involved in all of these cases, to be employees of the general agents, then the latter must be regarded as owners *pro hac vice*, and grave problems of regulation, taxation, control, and wartime security are bound to arise. The financial question is of but little importance, for if the government be sued directly under the Suits in Admiralty Act it must pay the judgment, as likewise it must pay a judgment against the general agent, if the agent reasonably defends itself.

Both the problem of liability to local and foreign regulation and taxation, and that of violation of secrecy, are more than academic. States and foreign governments have sought to tax the operation of government-owned and operated vessels on the grounds that the activities taxed were those of the general agents and not the United States. Suits against agents in state courts before juries make it impossible to preserve wartime secrecy in respect of such matters as convoy instructions, the details of swept channels and

harbor defenses, the operation of secret navigation and detection equipment, and other equally confidential matters. During the war, this Court, by a special rule, was able to preserve secrecy in the United States admiralty courts, but no such power exists with regard to state courts and the presence of juries would seem to make the application of any similar method impracticable.

II

In our view, proper interpretation of this Court's decisions in *Hust* and in *Caldarola* v. *Eckert,* 332 U. S. 155, requires that petitioner, as a general agent under a GAA 4-4-42 agreement, be held not liable, as a matter of law, on respondent's claim. The combined effect of these cases is to establish that, in cases where (as here) the prospective provisions of the Clarification Act apply, general agents under GAA 4-4-42 are subject to liability only for the torts of their own employees; that the general agents are not owners *pro hac vice* of the vessels which the United States itself operates; and are not liable for the acts of the masters and crews, with whom the United States mans, navigates and physically operates its vessels, and who are exclusively agents or employees of the United States.

III

1. The *Caldarola* case was correct in holding that general agents, such as petitioner, did not

have possession and control of the vessel and were not owners *pro hac vice*. The duties assigned to general agents under standard form GAA 4-4-42, which the Government employed in the operation of its vessels during wartime, restricted the authority of these agents to the operation of the shoreside business of the vessels. They neither manned, operated nor navigated the vessels themselves. In private employment, as we show in Point IV, such a relationship would clearly not give rise to liability on the part of the agent for the acts of the master and crew of the vessels which it was husbanding. Consideration of the circumstances in which the Government assumed wartime operation of its vessels, of the method of manning the vessels, of the terms of GAA 4-4-42 and the implementing WSA regulations, and of congressional approval of the procedures adopted, compel a like result here and demonstrate that the agents were not operating agents or owners *pro hac vice*.

2. During World War I, the government vessels were operated directly by the United States Shipping Board. In peacetime, the Government demised its vessels for private operation either under bareboat charters, or, where that was impossible, under operating agency agreements such as that involved in *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575. During World War II, the Government again took over the direct operation of its vessels. To accomplish this, it employed

agents: experienced shipmasters for the navigation and physical management and operation of its vessels; experienced shipping companies as its general agents to husband the vessels ashore, and as berth agents to operate the business of dicharging cargo and other port services.

Nowhere in the GAA 4–4–42 agreement is there found any language amounting to a demise or delivery of physical possession of the vessel, despite many attempts by claimants to establish the contrary. This is the critical aspect in which the wartime agreement differed from the bareboat charters used from 1940 to 1942, as well as from the previous operating agency agreement employed in the *Brady* case, which required the "Managing Agent * * * to man, equip, victual, supply and operate the vessels." Under the agreement here involved, the master, as the direct "agent and employee of the United States," manned, navigated and physically managed and operated the vessel. This crucial change was made in the Spring of 1942 because the Government deliberately desired to return, during the war, to exclusive possession and control of its vessels.

3. The distribution of the various operating duties between the shipmasters, the general agents, and the berth agents, as compared with their unified exercise by the agent under the former agreements, establishes that the United States, and not its agents, was operating the vessels.

4. The procedure for manning the vessels likewise establishes that the United States retained its position of operating owner in exclusive possession and control. At the time the merchant fleet was requisitioned in March and April 1942, some 55,000 seamen were employed to man approximately 1,375 vessels, of which the United States owned only 10 percent and operated none. On VJ–day, in August 1945, over 220,000 seamen were manning some 4,300 vessels of which the United States owned and operated 90 percent. Article 3A (d) of GAA 4–4–42 made it plain that the master was the direct agent and employee of the United States, and that the crew, although procured through customary channels, were its employees. The article provides that the general agent shall "procure" the master for the United States; that the master shall be an "agent and employee" of the United States; and that the general agent shall procure and make available the officers and men for engagement by the master on behalf of the United States. The agreement further requires the general agent to procure the officers and men "through the usual channels and in accordance with the customary practices", and that the officers and crew "shall be subject only to the orders of the Master." The entire arrangement discloses that the general agent merely "operates" the "business" of the vessels, but has no authority over the master and no part in operating the vessels themselves.

This is confirmed by the seamen's contract of employment. The WSA required that the articles should state the name of the registered owner or operating company as "United States of America, War Shipping Administration," and in the space for address, "c/o XYZ Company, General Agent." In the instant case, the articles bore the stamped endorsement "YOU ARE BEING EMPLOYED BY THE UNITED STATES." Shipmasters and crew members were expressly made unclassified civil-service employees of the United States and, prior to the Clarification Act, the United States Employees' Compensation Commission granted them benefits under the United States Employees' Compensation Act.

At the time WSA devised this program of government operation with civilian personnel, collective bargaining agreements established the wages, working conditions, and employment practices of the majority of seamen. In order to satisfy the seamen and avoid delay, WSA signed over-all collective bargaining arrangements, known as the "Statements of Policy", with the nine principal maritime unions. In general, the Statements declared that preexisting labor policies would be maintained unless changed by agreement between the unions and WSA, and that general agents would be required to conform. By subsequent regulations, general agents were directed to follow existing collective bargaining agreements where they existed with the unions not parties to

the over-all arrangement or were authorized to negotiate agreements where none existed. No modifications or new agreements were to be effective until approved by WSA. By a practical arrangement with the National Labor Relations Board, the Administrator of WSA utilized the Board's facilities for the designation of bargaining units, while reserving WSA's right in respect of the Board's jurisdiction over the personnel of WSA operated vessels. A similar practical arrangement was entered into with the National War Labor Board in matters of labor disputes and wage stabilization. Finally, WSA became a participating signatory employer of the "Statement of Principles" which created the Maritime War Emergency Board to deal with matters of wartime compensation and bonus which could not be solved by the parties because of the restrictions of wartime secrecy. As a result of the foregoing, not only Federal agencies but almost all the States have always recognized WSA seamen as employees of the United States and the vessels as operated by the Government.

5. The precise terms of the general agency agreement, which were amplified by regulations issued pursuant thereto, and the similarity of the duties of general agents to those of the other types of shoreside agents employed by the Government (berth agents and berth subagents) establishes that the United States, and not its agents, was operating the vessels. A detailed

analysis of the various articles of the GAA 4-4-42 agreement establishes that the operations assigned to the general agents were those of husbanding, and that the functions of physical operation, management, and control of the vessels were retained exclusively by the United States. In fact, most of the provisions of the agreement were equally applicable to berth agents and berth subagents, who have never been thought or contended to be "operating agents."

6. The detailed regulations and instructions issued to general agents serve only to confirm that they were a mere channel of government control. They show the United States as operating owner commanding its shipmasters, through its agents who serve only as channel of communication.

7. Congressional treatment of WSA seamen establishes that the United States, and not its agents, was operating the vessels. The Clarification Act (57 Stat. 45) constitutes a specific legislative recognition that seamen serving on vessels owned or bareboat chartered to the United States, were government employees. That Act provided for the payment of Social Security contributions on behalf of such government seamen who theretofore had been excluded from the benefits of the Act. In other statutes, Congress explicitly dealt with such seamen in a manner which recognized that they were exclusively government employees. This is particularly true with re-

spect to unemployment compensation for which Congress made specific provision. Committee reports are replete with statements recognizing their status as government employees.

8. The materials set forth in this Point conclusively establish that the Government and not the general agents manned, navigated, and physically operated the vessels; that the general agents were neither operating agents in possession of the vessels nor even owners *pro hac vice;* and that the seamen manning those vessels were employees of the United States and not employees, in any sense, of the general agents.

IV

The United States, as operating owner in exclusive possession and control of its vessels, and not its general agents, was responsible for the acts of the master and crew. The limited nature of the general agent's authority has been explained, and it is unquestionable that between private parties such a relationship would not give rise to liability on the part of the agent for the acts of the principal's employees. No reason exists for applying a different rule to the United States.

1. Only one who is owner or owner *pro hac vice* operating the vessel is liable for the acts of the master and crew in its navigation and management. This rule is so settled in maritime law that only one case (*Cox v. Lykes Bros.*, 237 N. Y. 376),

dealing even obliquely with the question, has been found. If there is any doubt as to whether the general owner has divested himself of possession and control of the vessel, then it is presumed there has been no such divestment. In the maritime field it is essential to the status of an operating agent or owner *pro hac vice* that he be placed in exclusive possession and control of the vessels. Otherwise the agent is in the same position as a charterer to whom the use of the vessel but not the vessel itself is delivered. No liability for the negligence of the master and crew may be imputed to the latter nor to the agent who is not owner *pro hac vice*. And the function of the ship's husband in procuring the seamen clearly does not render him liable; an agent procuring servants for a principal is not responsible for their torts, nor is a superior servant liable for the negligence of a subordinate agent. The right of seamen to recover wages, and maintenance and cure follows the same rule. The operating owner alone is liable, because the contract of employment—the shipping articles—were entered into between the master, his agent, and the members of the crew. It is accordingly only in situations where language sufficient to constitute a demise of the vessel has been employed, that an agent would become an operating agent and thus an owner *pro hac vice* responsible for the acts of the master and members of the crew.

2. Certainly, no reason exists for applying a different rule where the United States is the principal. It is settled law, on the contrary, that a public agent is not responsible for the acts of subagents in the discharge of his official duties. Nothing in *Brady* v. *Roosevelt S. S. Co.* indicates the opposite. That case merely held that an agent operating a vessel of the United States under a demise was responsible for the acts of its own employees, even though the financial loss would ultimately be borne by the United States. Aside from *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, and the few lower court cases resting exclusively upon it, the established rules of maritime law have been uniformly followed. Even in those cases, while the agent has been deemed an "employer" for the purpose of being subjected to suit under the Jones Act, he is liable only for the negligence of persons performing his own work. The principle of the loaned servant rule applies and relieves him of liability for negligence of those doing another's work. Like principles govern claims for wages, cure, and maintenance. Thus, the application of the traditional rules of liability, applied in the *Caldarola* case, should be dispositive of the present case.

V

The Clarification Act requires that government-employed seamen shall vindicate their rights, arising after its enactment, exclusively by suit against the United States under the Suits in

Admiralty Act. The purpose of the Clarification Act, its legislative history, and the language which Congress employed, make this clear.

1. When the Government took over the operation of the merchant fleet in 1942, it was being operated exclusively by private shipping firms. Seamen manning that fleet had rights against their private employers under the Jones Act and the general maritime law, even where the privately operated vessels were government owned. When the Government took over, these seamen became unclassified civil service employees of the United States whose rights were thought to be restricted exclusively to those arising under the U. S. Employees Compensation Act. The change-over in employment occurred while many vessels were at sea and the rights of the seamen were, naturally, obscure. It was desired to preserve to those seamen their prior rights, and WSA asked Congress for legislation which would exclude them from the Government Employees' Compensation Act and continue their former rights under the Jones Act and the federal maritime law against their new employer, the United States. To preserve their rights during the change-over period, it was recommended that they have the right of election to proceed against their former private employer, to take the benefits of the Government Employees Compensation Act, or to enforce their rights under the Jones Act and the general maritime law against the United States.

2. The Clarification Act was before both the 77th and 78th Congresses. At an early stage, it was apparent that, on the advice of the Attorney General, the right to jury trial would not be permitted under the proposed Act, and that seamen would be remitted exclusively to a remedy against the United States under the Suits in Admiralty Act. Representatives of the various maritime unions, aware that their exclusive remedy would be against the United States, protested the exclusion of trial by jury. The reports make it clear that both houses of Congress nevertheless envisaged that the exclusive remedy would be by suit against the United States, and without a jury. The intervention of this Court's decision in *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, during the preparation of the legislation, did not affect its form, for Congress recognized that the GAA 4-4-42 husbandry agreement was essentially different from the Roosevelt form of operating agency agreement. Changes in the language of the bill during its consideration emphasize that general agents were not to be held liable.

3. The language of the Act is unambiguous. It requires that seamen, after the date of its enactment, "shall" bring suits for the vindication of their rights under the Suits in Admiralty Act. As only the United States may be sued under that Act, it is clear that no right of action against general agents, other than for their own torts, was intended to be continued. The use of "may" in

juxtaposition to "shall," in providing for the right of election in claims arising before the enactment, fortifies the mandatory intent of the word "shall." Finally, the provision for administrative disallowance before the institution of suit underscores the exclusiveness of the remedy against the United States. It could serve no purpose if its application could be avoided by asserting the claims against the agents instead of against the Government.

ARGUMENT

I

THE IMPORTANCE TO THE UNITED STATES OF THE GENERAL AGENCY CASES

The issue in this case, as in No. 360, *Fink* v. *Shepard S. S. Co.*, No. 430, *Gaynor* v. *Agwilines*, and No. 179, *Weade* v. *Dichmann, Wright & Pugh*, is the reach of this Court's decision in *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, where it was held on the limited record then before the Court that in a case arising prior to the War Shipping Administration (Clarification) Act of March 24, 1943, c. 26, 57 Stat. 45 (50 U. S. C. App. 1291), an employee of the United States, serving as a seaman on a vessel conceded to be operated by Moore-McCormack Lines for the War Shipping Administration, could recover damages for personal injuries by suit against Moore-McCormack instead of against the United States.

The importance to the United States of the reach of the *Hust* decision extends far beyond the question of the injured third party's forum or the extent of his recovery. As this Court recognized in *Caldarola* v. *Eckert,* 332 U. S. 155, the consequences to the national and international interests of the United States of imposing the liability of operating agents on the ships' husbands or general agents, who are employed merely to operate certain parts of the shoreside business of government-owned and operated vessels, would be far-reaching. "Serious issues affecting the immunity of Government vessels in foreign ports as well as immunity from regulation and taxation by local governments would needlessly be raised" (332 U. S. at 159). In *Brady* v. *Roosevelt S. S. Co.,* 317 U. S. 575, 585, this Court indicated that the question of liability differs from that of suability, and we believe that on the facts of the present cases, as of *Caldarola,* the *Hust* case does not here "reach the 'different question' whether 'a cause of action' against the Agent had been established" (332 U. S. at 160).

In time of war or national emergency preceding and following a war, national security requires that the United States directly operate the government-owned cargo fleet with masters and crews employed by the Government and responsible exclusively to it. Congress in both world wars gave specific direction and authority for such exclusively governmental operation, as opposed to the

private operation under bareboat charters and operating agency agreements which it had directed for the employment of the government-owned cargo fleet in time of peace. Obeying this Congressional command, the War Shipping Administration, as operating successor to the Maritime Commission, directly operated all government-owned vessels during World War II exactly as had the Shipping Board and its operating agency, the Emergency Fleet Corporation, during World War I.

It is of the greatest importance to the United States that the Government, and not its business agents, be recognized as operating owner in possession and control of government vessels which are manned, operated, and navigated by the Government through ship masters who were its direct agents and employees, and which were victualled, supplied, and maintained by it through shipping operators who were employed as ships' husbands and berth agents to operate the shoreside business of the vessels. If the masters and crews of such government vessels can be treated as the employees of such shoreside business agents rather than of the United States, then the latter must be deemed owners *pro hac vice* or operating agents of the vessels and the Government a mere reversionary owner who has parted with possession and control of its vessels.

The conclusion that the agents are operating the vessel and not merely its shoreside business is of

little practical importance to any such agent, for if the agents require the Government to assume their defense or reasonably defend themselves in litigation brought against them, they are entitled to reimbursement and indemnity from the United States. See *infra*, pp. 82–84. But to the Government, the results of the conclusion that such agents are operating agents in possession and control, may well be destructive of civilian government operation during future emergencies which may require direct government operation. Such a conclusion would make it undesirable for the Government again to follow the practice of employing the existing shoreside organizations of private shipping concerns to operate the business of government vessels.[a] It would probably induce the United States, in any future emergency, to operate all such vessels as part of its military sea trans-

[a] See H. Rept. No. 2572, 77th Cong., 2d sess., p. 8: "The Administrator, in the conduct of his duties and functions, makes very extensive use of the private organizations including those engaged in merchant marine insurance and related activities, steamship operators, stevedore, and terminal facilities, freight forwarders, and freight brokers and agents. Special skill, knowledge, and experience are made available in this manner for use in the integrated war effort. This development confirms the wisdom of the congressional policy in the recent years of stimulating and assisting the development of such private merchant marine and insurance facilities at substantial Government cost. The policy has permitted a quick change-over from peacetime to wartime operations of the entire merchant marine without any substantial loss of efficiency or impairment of morale." (Cf. letter of the General Counsel, U. S. Maritime Commission, Appendix B, *infra*, pp. 142, 149.)

port service and to expand or create complete new shoreside organizations of its own, with consequent increased expense and delay in effecting its direct operations.

The employment of existing private operators as agents, who are purposely denied possession or control over the Government's vessels and their masters and crews, is in strict conformity with the congressional policy of aiding the development of private shipping organizations for just such employment in national emergencies. It was in accordance with this plan that the War Shipping Administration terminated the pre-war contracts under which private operators had been owners *pro hac vice* of Government vessels and substituted direct Government operation with their aid as shoreside business agents. Moreover, in private shipping operations the use of shoreside business agents has been followed for many decades and in no instance have they ever been held to be operating agents of the vessel or employers of their masters and crews.

It seems obvious that Congess did not intend to authorize the violent alteration of the Government's authority over its vessels' operation in time of war that would result from regarding the general agents as owners *pro hac vice* exactly as when they were bareboat operators. Yet if the master and crew of government vessels can be deemed the employees of the vessels' shoreside business agents, these agents and not the

United States become the operating owners to whom the vessel belongs for the voyage and the vessels, not being in the possession of public authority, will not again be entitled to governmental immunity in foreign ports. Cf. *Mexico v. Hoffman*, 324 U. S. 30, 37–38; *The Navemar*, 303 U. S. 68, 74. Such a conclusion plainly defeats the intention of Congress, which has always taken care expressly to reserve the sovereign immunity of such vessels, although it has accepted civil responsibility for their acts. See 46 U. S. C. 747. Nothing in any act of Congress justifies holding that by employing private shipping operators, as general agents and berth agents, to operate certain shoreside business of the vessels, the Government has created an operating agency of the vessels themselves, transferred the operating ownership of the vessels in time of war and, without Congressional authority, abandoned such immunity in an emergency when its preservation is most important.

If the master and crew can be treated as employees of the agents so that the latter become thereby the operating agents of owners *pro hac vice*, the Government's vessels will also lose immunity in this country from regulation and taxation by State and local governments. In every case where private vessels are subjected to such regulation and taxation, government vessels, if they are thus deemed to be privately operated, may be similarly taxed and regulated. This last

consideration is already of particular importance in connection with the assertion of the liability of the United States, through its agents, for State unemployment insurance taxes. In the case of Government seamen employed through the War Shipping Administration, the Congress has made special statutory provision both for old age and survivors' insurance benefits[7] and for unemployment compensation insurance benefits.[8] If it be held that the Government's master and crew are employees of the shoreside agent instead of the United States, and that the former is operating agent or owner *pro hac vice* in possession and control of the government vessel, the agents will face the requirement of collecting additional taxes from both the seamen and the United States and of paying them over to the State government having local territorial jurisdiction of the agent. The point is of more than academic interest. The United States is currently resisting the attempt of the California tax authorities, based on their interpretation of *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, to collect over thirteen million dollars as unemployment insurance taxes on account of War Shipping Administration seamen. Such payment, more-

[7] War Shipping Administration (Clarification) Act of March 24, 1943, c. 26, 57 Stat. 45, as amended (26 U. S. C. 1426 (i); 42 U. S. C. 409 (o)).

[8] Social Security Act Amendments of August 10, 1946, c. 951, 60 Stat. 978, 42 U. S. C. 1331–1336.

over, will be without any corresponding increase in benefits to either the seamen or the Government, since Congress has already made special provision for unemployment benefits in such cases. Attempts are likewise being made by Iran, Iraq, and Cuba to impose various taxes for former visits of War Shipping Administration vessels to their ports. And there appears to be little doubt that, if in any future emergency similar operations were resumed, these countries, as well as others, would insist on their right to regulate, as well as tax, the Government's vessels as privately operated.

Finally, if the master and crew are employees of the agent which operates the vessel's shoreside business and the latter is the operating agent or owner *pro hac vice* in possession of the Government's vessel, the United States may be required to disclose secret defense procedure before juries in state court suits brought against agents because of damage or collision alleged to result from negligent operation, navigation and management of its vessels by the master and crew. The dangers inherent in such a result are tremendous. In time of war, litigation seeking to fix responsibility for such collisions involves convoy and routing instructions, the details of swept channels and other harbor defense procedures, the operation of secret detection and navigation equipment, and countless other matters of the highest secrecy. During the recent war, this Court, by special ad-

miralty rule effective in all United States courts, provided for the impounding of pleadings and the hearing of cases *in camera*, in order to protect the national interest in these respects.[9] No such action could be effectually taken if cases were to be tried before juries and in the state courts.

And to a lesser extent the same problem of secrecy is presented even in cases of personal injuries occurring on the high seas. Not only do many cases of personal injury arise from collision, but even when they do not, questions of defense procedures and defe[illegible]e installations are frequently involved.[10] Even when the suits were to be in federal courts where some steps to enforce secrecy could be taken, and despite the strenuous insistence of the seamen's unions that jury trial be accorded, "Congress, for reasons which to it seemed sufficient, determined to withhold that right from Government-employed seamen for the duration of the war." *Fink* v. *Shepard S. S. Co.*, 192 P. 2d at 268–269. To hold that the Govern-

[9] General Admiralty Rule 46, as amended June 8, 1942 (316 U. S. 717). Such collision risks are not insured by the Government and the defense is conducted solely by attorneys of the Department of Justice assisted by representatives of the government agency involved.

[10] In admiralty, General Admiralty Rule 46 is, of course, equally applicable. Such personal injury risks are covered by protection and indemnity underwriters who are in turn reinsured by the Government. Defense is conducted under the supervision of the Department of Justice by private attorneys appointed by the underwriters to act as of counsel to the United States Attorney for the district involved.

ment's shoreside agents are operating agents or owners *pro hac vice* and therefore subject to suit for the acts of the master and crew of the Government's vessels, would defeat this intention of the Congress and permit these actions to be tried before juries in State courts, thereby opening the way for the disclosure to the enemy of information which may be detrimental to the lives and safety of seamen, as well as to the safety of the country itself.

II

THE CONTROLLING CASES ON THE LIABILITY OF A GENERAL AGENT (*HUST* AND *CALDAROLA*) REQUIRE DISMISSAL OF RESPONDENT'S SUIT

We believe that the combined effect of the Court's two recent cases in this field (*Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, and *Caldarola* v. *Eckert*, 332 U. S. 155) is to require reversal of the decision below and dismissal of respondent's suit, without further examination of the relationship between the United States and its general agents or between the master and crew of the Government vessel and the general agent. Analysis of these holdings discloses that their combined effect is to declare that the agent is not liable for a tort of the kind for which respondent sues.

In *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, a divided court of seven members held, on a limited record, including the admission of Moore-McCormack's answer that it "was operating the

Liberty Ship S. S. *Mark Hanna* for and on behalf of the United States,'" that a civil-service employee of the United States, serving as a seaman on a government-owned vessel operated by the War Shipping Administration, could recover under the Jones Act for injuries resulting from the negligence of his fellow civil-service employees, the master and crew of the vessel, either by suit against the United States itself or, at his election, against the Government's general agent for the vessel. The majority opinion, by Justice Rutledge, declared that the general agent was an "operating agent" or "private operator" of the Government's vessel (328 U. S. at 717, 718, 720, 721, 724, 727, 730, 732) to whom, as such, the negligence of the master and crew is imputed.[11] The majority further upheld the right of crew members of government vessels to maintain such suits equally under the Jones Act and the general maritime law (see 328 U. S. at 719, 720), holding "it does not follow from the fact that Hust was technically the Government's employee that he lost all remedies against the operating 'agent' for

[11] October Term 1945, No. 627, R. 6. Cf. *Nolan v. General Seafoods Corp.*, 112 F. 2d 515, 517 (C. A. 1).

[12] It is well settled that an agent actually operating the vessel as distinct from operating its business "must be held, like a charterer, to be an owner *pro hac vice*." *Cox v. Lykes Bros.*, 237 N. Y. 376, 383; *U. S. Shipping Board Emergency Fleet Corp. v. Greenwald*, 16 F. 2d 948, 951 (C. A. 2); *Stewart v. U. S. Shipping Board Emergency Fleet Corp.*, 7 F. 2d 676, 678 (E. D. N. Y.); cf. *Quinn v. Southgate-Nelson Corp.*, 121 F. 2d 190 (C. A. 2), certiorari denied, 314 U. S. 682. As such, the agent is liable for the torts of the master and crew. Cf. Point IV, *infra*, p. 102.

such injuries as he incurred" (328 U. S. at 724).[13] Finally, the Court held that the provision of Section 1 of the Clarification Act (*infra*, p. 135), giving seamen of War Shipping Administration vessels a retroactive right of election to pursue any remedies available to them prior to the enactment of that Act, confirmed these rights of recovery against operating agents, observing, "We need not determine in this case whether prospectively the Clarification Act affected rights of the seaman against the operating agent and others, or simply made sure that his rights were enforceable against the Government" (328 U. S. at 727). As to Hust's claim, which arose prior

[13] The Jones Act refers only to "any seaman who shall suffer personal injury in the course of his employment" (46 U. S. C. 688) and by its terms does not seem to require a common-law employer-employee relationship. Prior to the contrary decision of the Oregon Supreme Court in the *Hust* case (176 Ore. 662), it had been generally held in the lower courts that whenever an agent would be independently liable to third persons for the negligence of employees doing its own work in connection with a government vessel's shoreside business, such third persons, if seamen, might enforce such independent liability by suit under the Jones Act, with the benefit of jury trial and absence of the contributory negligence and assumption of risk defenses. See *e. g.*, *Gay* v. *Pope & Talbot*, 183 Misc. 162, 167; *infra*, pp. 111–113. Since they are considered "seamen" for the purposes of the Jones Act (*International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 52), longshoremen, who load and unload the vessel under direction of the ship's officers, though technically employees of a contracting stevedore, would appear equally entitled to Jones Act benefits. Cf. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 95; *Pennsylvania R. Co.* v. *Roth*, 163 F. 2d 161 (C. A. 6), certiorari denied, 332 U. S. 830; *Cimorelli* v. *N. Y. Central R. Co.*, 148 F. 2d 575, 577 (C. A. 6).

to that Act, it was declared (328 U. S. at 730–731), that the change from prior peacetime private operation, under forms of agreement by which the Government had demised its vessels on bare-boat conditions to charterers or operating agents [14] who operated them as owners *pro hac vice*, manning and navigating the ships with crews who were their own private employees, "was not in these circumstances [of the retroactive provision of the Clarification Act] enough to deprive seamen of that remedy" to elect to proceed against government agents whom the majority regarded as still "operating agents" (328 U. S. at 731, 732). That a contrary result might be required in the future by virtue of the forward-looking provisions of the Clarification Act was emphasized, the opinion cautioning, "Whether or not this conserving intent was made effective in the prospectively oper-

[14] To which type of demise the opinion refers as "the standard agreement" is not clear. The operating agency agreements of 1937 involved in *Brady* v. *Roosevelt SS. Co.*, 317 U. S. 575; *Quinn* v. *Southgate Nelson Co.*, 121 F. 2d 190 (C. A. 2), certiorari denied, 314 U. S. 682, and *Odgaard* v. *Cosmopolitan Shipping Co.*, 171 Misc. 244, were not standard forms but special forms in effect with only four companies, and had been discontinued in 1940. See letter of General Counsel, United States Maritime Commission, Appendix, *infra*, pp. 143, 155–161. The standard form which the wartime G.A.A 4–4–42 general agency agreement replaced was the so-called "1-cent bareboat charters" to private operators. H. Merchant Marine and Fisheries Committee Document No. 4, 1945, *Compilation of Standard Contracts Forms of the War Shipping Administration*, pp. 124–137; and see *ibid.*, footnote 11, p. 330. See *infra*, pp. 50–52, 57–61.

ating provisions of the Act, it is made clear beyond question in the retroactive ones" (332 U. S. at 733).

Mr. Justice Douglas, with whom Mr. Justice Black joined, filed a concurring opinion. They were not prepared to go so far as to hold that Moore-McCormack was in all respects an operating agent, apparently because of the absence from the wartime standard form of GAA 4–1–42 agreement of any language importing demise of the vessel to the agent, which is essential to the creation of an operating agency. Their separate concurring opinion adds "a few words to indicate that the result we have reached is consonant with the traditional rules of liability" (328 U. S. at 734); "There was no demise," they conclude, "But the form of the agreement is not important if the functions of the operator were those of an owner *pro hac vice,*" which "is the true condition which existed here" (328 U. S. at 738)

The effect of the *Hust* case was thus to establish that (a) in cases arising prior to the Clarification Act, one who is (b) an operating agent or an owner *pro hac vice* of a government-owned and operated vessel is liable under either the Jones Act or the general maritime law to (c) a seaman serving the vessel.

Justices Reed, Frankfurter, and Burton dissented. Analyzing the GAA 4–1–42 agreement in detail, they concluded that the general agent was not created operating agent of the Govern-

ment's vessels, but was employed only to act in respect of certain business not connected with their navigation and physical management, while the United States continued as operating owner in exclusive possession and control of the vessels themselves (328 U. S. at 747–748). Suit against the United States, they said, was the exclusive remedy of government employees serving as seamen on War Shipping Administration vessels where negligence of the master and crew was involved. "What the Clarification Act does and what it obviously was intended to do," they declared, "was to continue the policy of requiring seamen who were employees of the United States to continue to vindicate these rights through the Suits in Admiralty Act" (328 U. S. at 748).

In *Caldarola* v. *Eckert*, 332 U. S. 155, a majority of five Justices, over the dissent of the four Justices who were the majority in *Hust*, held, on a more complete record, that an employee of a stevedoring contractor of the United States, serving on a government-owned vessel operated by the War Shipping Administration, could not recover, under the law of New York, against the Government's general agent for the vessel. The Court's opinion, by Justice Frankfurter, rejected any construction of the GAA 4–4–42 agreement which would make the general agents even owners *pro hac vice* (much less full operating agents) of government-owned and operated vessels in time of war (332 U. S. at 158–159), and expressly held the agents not to be in "possession and control" of the vessel (332 U. S. at 158).

Moreover, in the view of the majority, neither the *Hust* case nor *Brady* v. *Roosevelt SS. Co.*, 317 U. S. 575, established that government agents were liable for the negligence of the masters and crews by whom the United States navigated and operated its vessels. It was emphasized that those cases established only that government agents were not immune from liability for their *own* torts and suit could be brought freely against them. The *Hust* case held only "that under the Agency contract the Agent was the 'employer' of an injured seaman as that term is used in the Jones Act, and a seaman could therefore *bring* the statutory action against such an 'employer'" (332 U. S. at 159, emphasis supplied). "The Court did not hold that the Agency contract made the Agent for all practical purposes the owner of the vessel. It did not hold that it imposed upon him, as a matter of federal law, duties of care to third persons, more particularly to a stevedore under employment of a concern unloading the vessel pursuant to a contract with the United States." Similarly, the *Brady* case "did not reach the 'different question' whether 'a cause of action' against the Agent had been established" (332 U. S. at 159–160).[14a]

The effect of the *Calderola* case was thus to establish that (a) in cases where the Clarification Act does not apply, one who is (b) not an owner

[14a] A petition for rehearing, based on WSA's practice of using "delivery" certificates to evidence the beginning and end of the agent's period of accountability, was denied. See *infra*, p. 57, fn. 24.

pro hac vice of a Government-owned and operated vessel is not liable, at least under the law of New York, to (c) a longshoreman serving the vessel. Although the particular individual involved was a privately employed longshoreman, the opinion contains no suggestion that the case of a civil-service crew member, such as had been involved in *Hust*, was distinguishable. All third persons—whether crew members, passengers, longshoremen, shippers, or even owners of vessels and shore structures injured by collision—appear to have been lumped together by the *Caldarola* decision, insofar as the general agent's liability is concerned, just as they would have been by the *Hust* case. Certainly the rationale of the *Caldarola* case is even more applicable where a crew member instead of a longshoreman is the plaintiff. Maintenance of a suit against the agent by a civil-service crew member must result in the same "consequences, to both the national and international interests of the United States," and will raise the same "serious issues affecting the immunity of Government vessels in foreign ports as well as immunity from regulation and taxation by local governments" as occur in the case of a suit by a privately employed longshoreman (332 U. S. at 159). Indeed, so far as concerns the necessity for secret proceedings before a judge *in camera*, as in admiralty in wartime, the danger of disclosing matters affecting the national defense in the course of

a jury trial is far greater in a crew member's action. The facts involved in a longshoreman's injury commonly occur in port; those involving a crew member are usually on the high seas or in foreign ports, and special defense installations, convoy routing instructions, and other secret defense procedures are commonly involved.

The four Justices who constituted the majority in *Hust* dissented from the *Caldarola* decision, Justices Douglas, Black and Murphy reaffirming the position in that case that the Government's agents were, at least, owners *pro hac vice* (332 U. S. at 160). Justice Rutledge, in a separate dissenting opinion, took the position that in the circumstances the negligence was that of the agent (332 U. S. at 161) and that there was no good reason not to impose liability upon the agent, "in view of the scope of the indemnity provided" by the United States (332 U. S. at 167).

We believe that the combined effect of the *Hust* and *Caldarola* cases is thus to establish that, in cases where the retroactive provision of the Clarification Act does not apply, general agents under GAA 4–4–42 agreements are subject to individual liability only for the torts of their own employees; all injured third parties may sue these agents for such torts under the general law and, if seamen, may bring suit against them under the Jones Act as well. But general agents are not owners *pro hac vice* of the vessels which the United States

operates nor liable for the negligence of the civil-service masters and crews with which the Government mans, navigates and physically operates its vessels.[15] This conclusion seems to us to be required by the rationale of the *Caldarola* decision. We submit that if there is any implication of the *Hust* opinion which is inconsistent with this view, it has already been authoritatively rejected by the later case and no longer governs.

Respondent's claim arose after the enactment of the Clarification Act, and is founded upon the alleged negligence of the shipmaster and of shoreside agents other than petitioner. It follows, under this Court's controlling decisions, that he—a government seaman—cannot hold petitioner—a general agent under a GAA 4-4-42 contract—liable for his injuries.

* * * * *

In our view, as this Point indicates, the *Caldarola* case is decisive, and the Court need not look beyond that decision for the answer to the question presented in these "general agency" cases. However, since the issue has been much mooted and there have been serious differences among the Justices, the remainder of our argument will go behind the decided cases to show.

[15] There can be no question, as we demonstrate in Point IV, that a general agent without possession and control of the vessel, and which is not an operating agent or owner *pro hac vice*, cannot be held liable for the negligence or misconduct of master or crew.

the correctness of the basis of the *Caldarola* holding, and also to point out the additional grounding for petitioner's contentions furnished by the prospective provisions of the Clarification Act.

III

THE UNITED STATES, AND NOT ITS AGENTS, WAS THE OPERATING OWNER IN EXCLUSIVE POSSESSION AND CONTROL OF ITS VESSELS; AND ITS AGENTS, SUCH AS PETITIONER, WERE SOLELY SHORESIDE BUSINESS AGENTS

A survey of the duties and functions of general agents, such as petitioner here, proves the entire correctness of the holding in *Caldarola* that these agents were not in possession and control of the vessels nor owners of the vessels *pro hac vice* (332 U. S. at 158–9).

1. *Introduction and summary.*—The ships' husbands or general agents of the Government, employed under the wartime standard form GAA 4–4–42 agreement, were strictly confined by the Government to operating the accounting and certain other shoreside business of the government vessels assigned to them.[10] The general agent performed the duties of storing and supplying the ship, but all purchases by it were made in the name of the United States and most were

[10] These matters were common knowledge in the trade and are explained in detail in the letter of the General Counsel of the United States Maritime Commission, submitted in response to the inquiries of this Court in *Caldarola* v. *Eckert*, No. 625, October Term, 1946, Appendix B, *infra*, pp. 142–170.

merely ordered under the preexisting master contracts made by the War Shipping Administration. Sales tax was not payable since the purchases were in law made by the United States. The agent, like all ships' husbands from classic times, "procured" the crew. That is, it ordered the crew from the union hiring halls on requisition of the master as directed by the War Shipping Administration, or if the union could not supply the men, called on War Shipping Administration's Recruitment and Manning Organization. The men were hired by the master who was an independent agent and employee of the United States. The general agent had nothing to do with determining in what service the vessel would be employed or where it would go. Usually such information was secret and the agent learned it only from the master when the voyage had ended.

The general agent gave the master no instructions as to how to navigate the vessel. These were given him in convoy conferences or in sealed envelopes forwarded by the War Shipping Administration. The agent gave the master no independent instructions as to the management of the vessel. All such instructions came from the War Shipping Administration in the form of written regulations, bulletins, directives, and instructions which the agent was required to pass on to the master or masters of vessels allocated to it for husbanding. The general agent as such had

nothing to do with loading cargo or its solicitation, the collection of freight, or the arrangements for wharfage and towage. These matters were the responsibility of the master on the one hand and the berth agent on the other, unless the general agent was given orders by the War Shipping Administration to perform berth agent duties for the vessel as well as the husbanding duties.

When the vessel reached foreign ports the general agent ordinarily had nothing to do with her. Even the husbanding duties she might require were performed by the berth agent, if in the United Kingdom, or by the Army or the War Shipping Administration itself if elsewhere. When the vessel returned to the United States the general agent's duties had to do primarily with accounting, pay rolls, and reports. It assisted the master and purser in making up the pay roll and obtained the money from the special deposit bank account maintained by the War Shipping Administration for the agent to use in performing its fiscal duties. If repairs were requisitioned by the master and chief engineer, the general agent arranged for them under preexisting master contracts made by the War Shipping Administration if amounting to less than $10,000, or requested special instructions from the War Shipping Administration if the total exceeded $10,000. During certain periods in certain ports, even this amount was reduced for purposes of closer control by the War Shipping Administration.

At no time did the work of the general agent extend to operating the vessel. It did not man, navigate, manage, or control the vessel. Its authority stopped at the water's edge and its agency was general in name only. In short, the United States remained the operating owner in exclusive possession and control of its vessels.

As we show in Point IV, in private shipping operations an agent thus lacking control of the work would clearly not be liable to third persons—whether they were seamen, longshoremen, passengers, shippers, or the owners of vessels and wharves damaged by the vessel—for the negligence of the master and crew in the navigation and management of the vessel. We submit that analyses of the background which in 1942 resulted in government operation, of the War Shipping Administration's arangements with the unions and others regarding crewing the vessels, of the terms of the GAA 4-4-42 (general agency) agreement, of the pertinent operations regulations of WSA, and of the recognition and approval accorded by Congress to the acts of WSA, all confirm the conclusion that the government's general agents were solely shoreside business agents for the Government, and that the same rule should be applied to them as to other similar husbanding agents for private principals.

2. *The background of the change-over in 1942, from bareboat chartered private operation to direct government operation, establishes that the*

United States and not the agents was operating the vessels.—At the time War Shipping Administration took control of the merchant fleet in February and March 1942, there were some 55,000 seamen employed in the off-shore trades, manning approximately 1,375 vessels, totaling 12,000,000 deadweight tons. Less than 10 percent of these vessels were government-owned and even those were privately operated under the Maritime Commission's system of so-called "one-cent bareboat charters" (*infra* pp. 51–52) and manned by seamen all of whom were privately employed. On VJ-day in August 1945, there were over 220,000 seamen manning some 4,300 vessels, totaling over 45,600,000 deadweight tons. As a result of the sinkings and the Maritime Commission shipbuilding program, the percentages had become reversed, and all but 10 percent of the vessels were owned and operated by the War Shipping Administration and were manned by seamen who were civil-service employees of the United States. This vast expansion was more than accounted for by the Maritime Commission's building program under which 5,220 ships were built.[17] These newly constructed vessels were owned by the United States and they were manned and operated by WSA. They were built for war use. Accordingly, title was retained by the United States.

[17] The difference is represented by sinkings and by vessels of merchant-type assigned for operation by the armed services.

They were allocated to existing shipping companies in accordance with the GAA 4–4–42 husbanding agreement, as the older government-owned vessels and the requisitioned ships had been.

In the history of this change-over, from private operation by private shipping organizations with privately employed masters and crews, to direct government operation in aid of the military forces, but with civilian government-employed crews, lies the key to the legal problems presented by the general agency cases. For many years the Government has been engaged, in peace and in war, in the ownership of a fleet of cargo vessels. But its wartime operations have followed a pattern entirely distinct from those followed in peacetime.

During World War I the Government's vessels were directly operated by the United States Shipping Board. With the return of peace, however, direct government operation ceased and the vessels were turned over to operating agents who were owners *pro hac vice* in possession and control of the Government's vessels. See *U. S. Shipping Board Emergency Fleet Corp.* v. *Greenwald*, 16 F. 2d 948, 951 (C. A. 2); *Stewart* v. *U. S. Shipping Board Emergency Fleet Corp.*, 7 F. 2d 676, 678 (E. D. N. Y.). Finally, the Merchant Marine Act, 1936, directed the United States Maritime Commission to arrange for the operation of its vessels by bare-boat charter to private operators. In both these demise agency and demise charter types

of operation, the private operators were owners *pro hac vice* or operating owners in possession and control of the vessels, employing their own masters, crews, and berth agents. The United States was a mere reversionary "general owner" which had divested itself of possession and control.

In order to assure operation of ship lines in trades, which, while unprofitable, were deemed essential, the Merchant Marine Act, 1936, provided that if it should be impossible to find private operators willing to operate the vessels under bareboat charter, the Commission temporarily might arrange for their operation under whatever arrangements it should find advantageous (46 U. S. C. 1194, 1197 (c)). Under this authority, the Commission adopted the special demise form of operating agency, employed from 1937 to 1940, which was involved in the cases of *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575; *Quinn* v. *Southgate Nelson Corp.*, 121 F. 2d 190 (C. A. 2), certiorari denied, 314 U. S. 682; and *Odgaard* v. *Cosmopolitan Shipping Co.*, 171 Misc. 244. This exceptional form of agreement, generally referred to as the "Roosevelt agreement" from the case of that name, was executed with only four agents.[18] It was a true operating agency agreement, under which the vessels were demised to the four agents as operating owners in posses-

[18] The agreement appears in the record of the *Brady* case, No. 269, October Term, 1942, pp. 21–32. It is summarized in the opinion, 317 U. S. at 576, n. 1.

sion and control, to man, victual, supply and navigate the vessels with masters and crews of their own selection. This method of private operation continued until the sale in 1940 of the last of the government-owned shipping lines. Thereafter, all government-owned cargo vessels were operated exclusively by private operators, to whom they were demised under bareboat charters, until the resumption in the spring of 1942 of the direct government operation by the War Shipping Administration with which we are here concerned.

As the national emergency deepened in 1941, the need of government control of the merchant fleet became evident. For the ordinary forms of bareboat charter of government vessels theretofore in use, the Maritime Commission substituted the "one-cent bareboat charters," whereby the private operators of the government-owned vessels were required to make only such voyages as directed by the United States and to give preference to such cargoes as the Government might require.[19] To extend government control to that

[19] Under this form of charter (H. Merchant Marine and Fisheries Committee, Doc. No. 4, 1945, *Compilation of Standard Contract Forms of the War Shipping Administration*, pp. 125 *et seq.*), which was involved in *Carroll* v. *United States*, 133 F. 2d 690 (C. A. 2), and *McCormick* v. *Moore-McCormack Lines*, 54 Supp. 399 (E. D. Pa.), the vesels were operated for the private account of the charterer, who agreed to operate the vessels in certain trade routes, and to pay the United States a nominal basic charter hire and additional charter hire in such amount as the aggregate net profits per

part of the merchant fleet which was privately owned as well as privately operated, the Ship Warrant Act (55 Stat. 591, as amended; 56 Stat. 370), effective in September 1941, was enacted. This provided, through allocation of repair and supply facilities, a degree of compulsion upon private owners not dissimilar to that already being exercised in the case of government-owned vessels under the one-cent bareboat charters. This assumption of government control did not, however, affect the private employment contracts with crew members.

In February 1942, it became obvious that mere control of the vessels was inadequate and direct government operation was required. The War Shipping Administration was organized, the one-cent bareboat charters terminated.[49] Gradually, between April 1942 and November 1943, substantially all ocean-going cargo vessels were requisitioned either for title or for use on a bareboat basis. The requisitioned vessels, like the government-owned vessels, were thenceforward directly operated by the Government with government-

month exceeded an amount equal to one cent per bale cubic foot of the vessels' underdeck bale cubic capacities. The United States also entered into a so-called Preference Agreement with each company, whereby it reserved the space of the vessels and provided for the payment of freight for the space reserved.

[49] Pursuant to the policy announced in Press Release 1171 (WA), issued February 25, 1942, the Administrator of the War Shipping Administration, by his telegram of March 22, 1942,

employed crews and allocated to general agents for husbanding.

3. *The distribution of the various operating duties between the shipmasters, the general agents, and the berth agents, as compared with their unified exercise by the agent under the former agreements, establishes that the United States and not the agents was operating the vessels.*— In conducting these wartime direct operations of its vessels, the United States, like other ship operators, made use of the three coordinate classes of agents usual in the conduct of the shipping business—the shipmaster, the ships' husband or general agent, and the consignee of the ship or berth agent—each responsible directly to the United States as operating owner in possession and control for the matters with which it was respectively entrusted, and none of them exer-

advised the companies operating under one-cent bare-boat charters that he had decided to cancel all such charters and to substitute therefor a General Agency Service Agreement. In that telegram the Administrator stated that allocations of vessels, made subsequent to February 25, 1942, under one-cent bare-boat charters were canceled as of the date of the allocation; as to earlier allocations, the companies were offered the option of making the cancellation of the bare-boat charter effective (a) retroactively to the inception of the bare-boat charter, or (b) retroactively to the commencement of any voyage thereunder, or (c) the earliest termination date permissible under the terms of the bare-boat charter. By operation of Article 20 and Exhibit A of the GAA 4-4-42, the one-cent bare-boat charters and Preference Agreements were canceled and the GAA 4-4-42 substituted therefor in accordance with the option exercised by the company. See *infra*, pp. 84-85.

cising control or authority over the others.[21] The United States employed experienced shipmasters as its agents afloat for the physical operation and management of its vessels, and experienced shipping operators as its agents ashore both as "general agents" to "husband" its ships, or operate their accounting and other business, and as "berth agents" to manage the operations of obtaining and discharging cargo and other port services.

The shipmasters and their crews were expressly made civil-service employees of the United States, in the unclassified and excepted service covered by Schedule A of the Civil Service Rules.[22] The masters' employment was without any special written contract in accordance with the terms of the customary maritime usages and the general maritime law. (See 2 Parsons, *Shipping* (1869),

[21] The classical exposition of the coordinate functions of shipmasters and ships' husbands has always been that of Justice Story, which continues to be substantially accurate to this day. Story, *Agency* (9th ed. 1882), § 35, Ships' husbands, § 36, Masters of Ships. Berth agents are to some extent a later development. In Story's day vessels did not operate on routes or schedules, and obtaining and delivering cargo, if not left to the master, was entrusted to another agent afloat—the supercargo. Today a port agent is necessary to look after the cargo at the berth and perform related duties.

[22] Civil Service Rules, Schedule A, sec. xxi (1), 5 Code of Fed. Regs., 1943 Cum. Supp., p. 1488, sec. 50.21 (Executive Order No. 9004, 7 F. R. 2, Executive Order No. 9054, 7 F. R. 837), established by the President under authority of Revised Statutes 1753 (5 U. S. C. 631); see also, War Shipping Administration Operations Regulations No. 12, Supplement 1, Appendix A, *infra*, p. 140.

pp. 3–13; Bouvier, *Law Dictionary* (1934), "Master of a Ship".) They accordingly had physical possession, custody and control of the vessels afloat, as the direct representatives of the United States as their operating owner. They had, in accordance with the law maritime and under the GAA 4–4–42 agreement, the exclusive authority to employ and discharge seamen on behalf of, and subject to, general instructions from the Government as operating owner. *Butler* v. *Boston & Savannah S. S. Co.*, 130 U. S. 527, 554; *Farrel* v. *McClea*, 1 Dallas 392, 393; *Hughes* v. *Southern Pacific Co.*, 274 Fed. 876 (S. D. N. Y.); see *infra*, pp. 63–66.

The shipping operators engaged by the United States as ships' husbands were also employed on terms which were substantially in accord with maritime custom (see Story, *Agency*, § 35; Bouvier *Law Dictionary* (1934), "Ship's Husband"), but were more fully prescribed in operations regulations as well as in the standard form GAA 4–4–42 husbanding agreement. Similarly, the operators engaged as berth agents and sub-agents were employed on terms substantially the same as in private shipping operations and were more fully described in the standard form of berth agency agreement.[2]

[2] The definitions of the duties of these agents are as follows:

"*General Agents defined.* A General Agent is one who takes care of the vessel's business on behalf of the War Shipping Administration, under a standard form of service agreement (GAA 4–4–42), appoints Agents as directed by the

This division of the shoreside duties between the general agent and berth agent for government vessels makes it abundantly plain that on neither of them did the United States confer the operating ownership or possession and control of its vessels. The duties of both these shoreside agents and the method of operation are fully explained in the letter of the General Counsel, U. S. Maritime Commission.

War Shipping Administration to handle those functions which relate to the handling of the cargo and functions incidental thereto, and assumes those duties when not otherwise instructed, obtains all accounting for all revenue and expenses and accounts to the War Shipping Administration for all business of the vessel" (G. O. 12, June 12, 1942; 7 F. R. 4496, 46 CFR, 1943 Cum. Supp., p. 11417).

"(a) *Berth sub-agent.* A berth sub-agent is an operator of United States flag vessels who is recognized by the War Shipping Administration as a regular berth operator in a certain service, and who has been designated by the War Shipping Administration as eligible for appointment by an Agent or General Agent as a sub-agent to perform such services of the Agent or General Agent as may be agreed upon for a vessel while it is operated in the regular service of the berth operator" (G. O. 12, Supp. 4, June 22, 1942, as amended by Supp. 7, Sept. 22, 1942; 7 F. R. 4741, 7561, 46 CFR, 1943 Cum. Supp., p. 11417).

Berth agents do not appear to have been specifically defined. "*Berth Agent Service Agreement (BA).* (a) Unless otherwise determined by the Administrator, when a vessel assigned to an Agent or General agent is required for operation in a service in which another operator is recognized by the War Shipping Administration as a regular berth operator, or as being otherwise qualified to operate in such service, such operator will be designated by the War Shipping Administration as the berth agent of the United States to operate the vessel in such service" (G. O. 21, Supp. 4, Dec. 29, 1943; 8 F. R. 17512, 46 CFR, 1943 Supps., p. 2113).

(Appendix B, *infra*, pp. 153–156, 162–169). Their coordinate and correlative functions show plainly that only the Government, as principal of all three agents—shipmaster, ship's husband, and berth agent—was the operating owner in possession and control of its ship.

Nowhere in the GAA 4–4–42 general agency agreement is there found any language amounting to a demise or delivery of the physical possession and control of the vessels to the general agent any more than to the berth agent, despite ineffectual arguments to the contrary.[24] The agent is a mere

[24] Counsel for third parties in substantially every case including *Calderola* (Pet. for rehearing (No. 625, October Term, 1946), pp. 23–25) have relied heavily upon War Shipping Administration's practice of using delivery certificates covering the assignment of vessels to agents under the GAA 4–4–42 agreement in the same basic form and employing similar language to those used for years to cover deliveries under bareboat charters. This, they assert, shows that possession and control is transferred to general agents the same as to bareboat charterers.

But such use of the terms "delivered" and "redelivered" equally accords with commercial usage in respect of mere contracts of affreightment, such as time and voyage charters, where only the right to have a cargo transported is conferred upon the party to whom the vessel is said to be "delivered", and where all that is meant is that the vessel is made available for loading under the directions of the owner's shipmaster. The language is not inadvisedly used, for it is specifically stated that the vessel is "delivered by War Shipping Administration" to the named agent "under the terms and conditions of Service Agreement Form GAA 4–4–42." As was observed in *Palardy* v. *American-Hawaiian S. S. Co.*, 169 F. 2d 619, 621 (C. A. 3), now pending on petition for a writ of certiorari, No. 186, Misc., this Term, "The use of the

operator of certain aspects of the ship's shoreside "business." The agreement, as we shall show, makes it plain that the master, as the direct agent and employee of the United States as operating owner, is in possession of the ship to the exclusion of the general agent. As pointed out by the General Counsel, U. S. Maritime Commission (Appendix B, *infra*, pp. 156–161), there is thus a striking and critical difference in the wartime standard form of general agency agreement here involved and the peacetime operating agency involved in *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575; *Quinn* v. *Southgate Nelson Corp.*, 121 F. 2d 190 (C. A. 2), certiorari denied, 314 U. S. 682, and *Odgaard* v. *Cosmopolitan Shipping Co.*, 1939, 171 Misc. 244.

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words 'delivered' and 'redelivered,' read in the light of the express reference to the general agency service agreement must, therefore, refer to the beginning and end of the agent's responsibility for maintaining the vessel and providing it with necessary stores and equipment."

In private operation it is essential to the creation of an operating agent or owner *pro hac vice* that he be placed in exclusive possession, command and control of the ship (see *infra*, pp. 102–109). Loose expressions concerning "delivery" and "redelivery" of the vessel are not effective to create a demise or impose liability for negligence of the master and crew. *Clyde Commercial S. S. Co.* v. *West India S. S. Co.*, 169 Fed. 275, 277 (C. A. 2); *The Volund*, 181 Fed. 643, 665–667 (C. A. 2); *Adams* v. *Homeyer*, 45 Mo. 545, 551–552. "These terms are more readily reconcilable with the idea of their employment with reference to the commencement and termination of the charter party than that they portend a transfer of the possession, control, and management of the ship from one party to the other." *Grimberg* v. *Columbia Packers' Assn.*, 47 Ore. 257, 270–271, 83 Pac. 194, 199.

By the Roosevelt operating agreement the United States demised the vessels themselves to a cost-plus contractor designated "Managing Agent" *to be operated* by it as owner *pro hac vice*. The latter, and not the United States, manned the vessel with a master and crew employed as its private agent and employees, the Government retaining only a limited veto power over the officers employed by the contractor. Thus, for example, the Roosevelt agreement (see record in *Brady* v. *Roosevelt S. S. Co.*, No. 269, October Term, 1942, pp. 21–32) stated: "The Managing Agent has indicated its willingness to undertake the management and *operation* of the Line" (Art. 1); "The Managing Agent *shall manage and operate* the said vessels exclusively under the trade name American Pioneer Line" (Art. 4); "The Managing Agent agrees to *man, equip, victual, supply and operate* the vessels, subject to such restrictions and in such manner as the Owner may prescribe * * *. The Licensed Officers and Chief Steward, however, are to be subject to the approval of the Owner" (Art. 7); "The Owner may terminate this agreement * * * in case of * * * any assignment, transfer, agreement or arrangement whereby the *management or operation* of the above described Line or vessels shall be divested from the Managing Agent" (Art. 25).

[25] Throughout this brief, all italics in quotations are supplied, unless otherwise indicated.

By the GAA 4-4-42 husbanding agreement, on the other hand, the United States retained navigation and management of the vessels for itself and employed private operators, including berth agents as well as general agents, only to operate certain parts of the vessels' business. Thus the general agent is employed by the United States "as its agent and not as an independent contractor, to manage and conduct *the business* of vessels assigned to it" (Art. 1). The general agent agrees to conduct the business of the vessels "for the United States, *in accordance with such directions*, orders, or regulations" as the United States may prescribe (Art. 2). The general agent undertakes to "maintain the vessel in such trade or service as the United States may direct" (Art. 3 A (a)); to "equip, victual, supply and maintain the vessels *subject to such directions*, orders, regulations and methods of supervision and inspection as the United States may from time to time prescribe". (Art. 3 A (c)); to "arrange for the repair of the vessels * * * including maintenance and voyage repairs and replacements" and to "exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels" (Art. 14). The general agent is to "*procure* the master of the vessels operated hereunder, subject to the approval of the United States" who, when employed, shall be "an agent and employee of the United States, and shall

have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel", and shall engage for the Government the officers and men required to fill the complement of the vessel who "shall be subject only to the orders of the master"—not of the shoreside agent (Art. 3 A (d)).

The whole arrangement of distribution of duties between the several types of independent agents discloses the Government's abiding purpose that the general agents should not be "operating agents" as in the *Brady*, *Quinn*, and *Odgaard* cases, *supra*, but should be ships' husbands whose authority stops at the water's edge and who are to operate only the "business" of the vessels and have no part in their manning, navigation, or physical management. Had it not been thought indispensable in wartime to terminate the status of the private operators as owners *pro hac vice*, the War Shipping Administration would not have replaced the private bareboat chartered operation by direct government operation.

4. *The procedure for manning War Shipping Administration vessels establishes that the United States and not its agents was the operating owner in exclusive possession and control.*—Consideration of the procedure for procuring and employing the civil-service masters and crews with which the War Shipping Administration manned its vessels likewise makes it plain that general agents were not operating agents employing the seamen, and

had no authority or control over the masters and crews of the Government's vessels, but were only ships' husbands or operators of certain aspects of the vessels' shoreside "business."[26]

Article 3 A(d) of the GAA 4-4-42 agreement (fn. 5, *supra* pp. 6-7) specifically provided that the master should be the agent and employee of the United States and that the crew, although procured through customary channels, should be employed by the United States. The relation of principal and agent thus extended from the War Shipping Administration through the master to the crew who, as a consequence, were employees of the United States.

In accordance with the immemorial custom

[26] Even if, as a result of their duty as ships' husbands to "procure" seamen for engagement by the masters on behalf of the United States, such crew members may be deemed "employees" of the agents for the purpose of bringing suit under the Jones Act, *Hust* v. *Moore-McCormack*, 328 U. S. 707 is not dispositive of the question of liability here because on the record there the agent was held to by an "operating agent" or owner *pro hac vice*, who would of course be liable for the torts of the master and crew, while the *Caldarola* case now holds that the agent is not such an owner *pro hac vice* (332 U. S. at 159). See *Shilman* v. *United States et al.*, 164 F. 2d 649, 652 (C. A. 2), certiorari denied, 333 U. S. 837. It is settled that an agent procuring the employment of others in such a manner is not responsible for the torts or contracts resulting from their acts. See *Restatement of Agency* (sec. 79, Comment (a)): "The agents so employed are the agents of the principal and not of the employing agent, who is not responsible to them for their compensation unless he so manifests, and is no more responsible for their conduct to third persons or to the principal than he for the conduct of other agents of the principal, unless he is negligent in their selection." See, *supra*, pp. 36, 40-43; *infra*, pp. 105-6, 112-13.

touching ships' husbands, Article 3 A (d) of GAA 4–4–42 directs the agent to "*procure* the master of the vessels operated hereunder, subject to the approval of the United States.". It thus makes plain that the agent may not supply a master employed by it, nor may it act as operating agent of the vessels. The agent is confined to *procuring* a master for acceptance or rejection by the United States as employer. The agreement directs that the master so procured shall be an "agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel." Thus it emphasizes that the agent may not itself give any orders whatsoever with respect to the navigation and management of the vessel to the master, who is declared to be an agent of the United States subject only to independent government orders with respect to these matters. Such orders as the agent may appear to give, in fact it merely passes on after receiving from the War Shipping Administration.

The Agreement further directs that the general agent "shall *procure and make available* to the Master *for engagement by him* the officers and men required *by him* to fill the complement of the vessel." The GAA 4–4–42 agreement thus denies the agent authority even to employ officers or men on behalf of the Government. The function of employing a crew for the United States is thus vested exclusively in the master as an independent agent of the Government. Respecting the method

of procurement, the agreement directs "Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time." Again, the GAA 4–4–42 agreement emphasizes that the agent's authority is to stop at the water's edge and prohibits the agent from interfering with the management of the vessel itself by requiring that "the officers and members of the crew shall be subject only to the orders of the Master." It concludes that the officers and crew "shall be paid *in the customary manner,*" that is to say, in cash, "with funds provided by the United States hereunder."

Reviewing the procedure for manning the vessels under GAA 4–4–42, we may state the steps in logical sequence as follows:

1. The master, once "procured" by the agent and employed by the United States, is the "agent and employee of the United States," not of the agent.

2. The crew is "procured" by the agent through the usual channels, that is to say, the union hiring halls, and is "made available" to the master "for engagement by him" as an independent agent of the United States, not for engagement by the agent.

3. The master "shall have and exercise full * * * authority" over the vessel's "navigation and management" and the officers and members of the crew are "subject only to the orders of the Master." The agent has no independent

authority to direct or control the master and crew; its authority ends at the shore.

4. The officers and crew are to be paid "in the customary manner with funds provided by the United States," that is to say, in cash by the master or his representative.

The arrangement thus effectuates the purpose that the agent merely "husbands" the vessels or "operates" their "business," but has no part in operating the vessels themselves. This is confirmed by the seamen's contract of employment. The crew members procured by the agents for employment by the master on behalf of the United States sign the statutory form of shipping articles before a United States Shipping Commissioner, like all merchant seamen, and the Commissioner must certify that they have read or have been told the contents of the articles (46 U. S. C. 564, 565, 713). The shipping articles constitute a contract executed by and between the master, as agent for the United States as operating owner of the vessel, and each member of the crew. See *Hughes* v. *Southern Pacific Co.*, 274 Fed. 876 (S. D. N. Y.). The form prescribed by statute requires that the name and address of the "Operating Company for this Voyage" or "Registered Owner or Manager" be expressly stated and a copy of the articles showing that information is "to be placed or posted up in such part of the vessel as to be accessible to the crew" (46 U. S. C. 577).[27]

[27] This is the document referred to as the "forecastle card" which is posted in the crew's quarters.

And in order that government seamen should be informed of their status, beyond any possible doubt, WSA required that the shipping articles should be filled out to state, in the space for the name of the registered owner or operating company for the voyage, "United States of America, War Shipping Administration," and in space for the address, "c/o XYZ Company, General Agent," giving the address of the agent (War Shipping Administration Operations Regulation No. 88 Revised). Moreover, all copies of the articles, including in particular that which is required by 46 U. S. C. 577 to be posted in the forecastle, are customarily imprinted with a rubber stamp advising members of the crew that they are not employees of the agents but exclusively employees of the United States through the War Shipping Administration. This stamp, in the case at bar, stated in large letters "YOU ARE BEING EMPLOYED BY THE UNITED STATES" (R. 606).[28]

Since the crew members so employed are unclassified civil-service employees of the United States (*supra*, pp. 6, 54), for all claims and causes of action arising prior to the Classification Act, the United

[28] In the companion case of *Gaynor* v. *Agwilines, Inc.*, No. 430, this Term, the stamp reads: "It is also agreed that the Master, Officers, and all other members of the crew are employees of the United States subject to the provisions of Public Law No. 17, of the 78th Congress, as amended, and are not employees of Agwilines, Inc., that all decisions, amendments and attachments of the Maritime War Emergency Board shall apply to and become a part of this agreement" (*Gaynor*, R. 38).

States Employees' Compensation Commission granted them benefits under the United States Employees' Compensation Act, 1916 (39 Stat. 742, 5 U. S. C. 751 *et seq.* See the Commission's 28th Annual Report (1944), p. 5; and its letter of July 31, 1942, H. Rept. 107, 78th Cong., 1st sess., at pp. 33–35). The Clarification Act substituted therefor the private seaman's rights to recover damages under the Jones Act and maintenance and cure under the federal maritime law. See Point V, *infra*.

Upon its creation on February 7, 1942, the War Shipping Administration devised this program of direct government operation with civil-service personnel. Thereafter, the privately owned 90 percent of the merchant fleet was requisitioned and the general agency plan for direct government operation of all government-owned vessels adopted as to those vessels, as well as the former government-owned cargo fleet, which had been converted from private operation under the one-cent bareboat charters. (See *supra*, pp. 51–52.) The wages and working conditions of the majority of the 55,000 merchant seamen, upon both government and privately owned vessels, were already established by collective bargaining agreements between the shipping companies operating the vessels and the maritime labor unions. Upon the adoption of the general agency scheme, the government-owned vessels were allocated to shipping operators already operating vessels bareboat-chartered to or privately owned by them. It was only natural that the sea-

men would desire that the wages, working conditions, and employment practices already established by collective bargaining for vessels privately operated should also obtain as to all vessels allocated to agents by WSA for husbanding under the GAA 4-4-42 agreements. Just as naturally, WSA desired to avoid the delay which would result from negotiating new collective bargaining agreements between the unions and itself as employer. To give effect to these desires, WSA in May and June 1942 signed the over-all collective bargaining arrangement known as the "Statements of Policy" with the nine principle maritime unions.[29]

The logic behind the Statements of Policy was formally to confirm to the seamen's organizations that in taking over the manning and physical operation of the government-owned cargo fleet with government employees, WSA proposed, none the less, that its crews should continue as civilians engaged in voluntary civilian employment, and that its operations, however closely allied to military and naval activities, were to continue as a civilian enterprise conducted with civilian government em-

[29] See *Fink*, No. 360, R. 188. Operations Regulation 1, May 25, 1942; Operations Regulation 1, Supplement 1, July 13, 1942; Operations Regulation 1, Supplement 3, August 6, 1942. The nine unions were: Sailors Union of the Pacific; Seafarer's International Union; Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association; Marine Cooks and Stewards Association; National Maritime Union; United Licensed Officers of U. S. A.; American Communications Association; National Organization of Masters, Mates and Pilots of America; National Marine Engineers' Beneficial Association.

ployees. Accordingly, the Statements of Policy: (1) declare that the intention of Article 3 A (d) of the general agency agreement is that agents will be required to procure officers and men in accordance with customary practices in order to make available the full supply of seamen and to avoid favoritism as between one agent and another with respect to preference of employment or the use of union hiring halls; (2) agree that the provisions of existing collective bargaining agreements with respect to wages and working conditions shall be continued and observed unless changed by mutual agreement between WSA and the unions; and (3) pledge the cooperation of the unions in (a) maintaining discipline, with special emphasis on upholding the authority of the master, (b) eliminating crews' mass meetings, subject to the recognition of spokesmen for each department of the ship, and (c) withholding the exercise of the seamen's right to strike.

The Statements of Policy were promptly implemented by a series of regulations and directives. General agents were instructed by Operations Regulation 1 and Supplements 1 and 3 thereof, to follow the policy outlined in the Statements of Policy. In order that the War Shipping Administration might be fully informed with respect to the agreements in effect, Supplement 2[30] directed general agents to forward copies of all of their collective bargaining agreements to WSA. General agents

[30] Issued July 13, 1942.

were further instructed by Supplement 4 [31] to follow the provisions contained in their collective bargaining agreements with respect to (1) the amendment of such agreements and (2) the settlement of disputes arising under them. It noted the distinction between (a) matters involving amendment, modification, or supplement of the agreements, covering such matters as increases in wages, which are outside the scope of subsisting agreements, and (b) matters involving only the clarification or interpretation of the provisions of subsisting agreements. General agents were (1) directed to obtain the approval of WSA upon amendments, modifications, or supplements of their agreements before placing them in effect, and (2) advised that WSA would consider itself committed by whatever determinations might be reached through the application of procedures specified in the agreements for the settlement of disputes over matters of clarification and interpretation.

Instructions were later issued, by Supplement 6, [32] to those general agents (1) who had agreements with unions not signatory to the Statements of Policy [33] and (2) who had no agreements with

[31] Issued August 15, 1942.

[32] Issued June 19, 1943.

[33] WSA has taken the position that the Statements of Policy constituted approval not only of the contracts of unions which were signatory thereto, but of all existing collective bargaining agreements between its general agents and seafaring unions. (Operations Regulation No. 1, Supplement No. 6, and memorandum of Assistant Deputy Administrator for Maritime Labor Relations, May 2, 1945.)

unions covering part or all of their seagoing personnel. Agents having such agreements were instructed nonetheless (1) to follow the grievance machinery therein provided for the settlement of disputes and (2) to obtain the approval of WSA upon amendments and modifications of agreements before putting them into effect on government vessels. Agents having no agreements at all were (1) authorized to negotiate agreements with a proper bargaining agent for an appropriate unit, (2) directed to obtain the approval of WSA upon such agreements before placing them in effect, and (3) instructed, in the absence of collective bargaining agreements, (a) to forward complete statements of their wage and manning scales and working rules, and (b) to submit for approval any changes in such wage and manning scales or working rules before putting such changes into effect. Supplement 6 also directed all general agents to forward without delay copies of all new agreements or proposed modifications not previously submitted. In particular, it was provided that the agents would act for WSA in negotiating future changes and new agreements which, in so far as they affected WSA seamen, "shall not be binding and effective as to such employees until all of the terms and provisions * * * shall have been approved by the War Shipping Administration." [34]

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[34] See *e. g.*, the collective bargaining agreement in the present case (R. 586, 603-604).

In connection with these collective bargaining arrangements between WSA and the maritime unions, one of the most important problems was the designation of the authorized collective bargaining representative for WSA seamen. Such seamen fell within the exclusion of employees of the United States from the coverage of the National Labor Relations Act. As a practical solution of this problem, the Administrator, through an exchange of correspondence with the National Labor Relations Board in October 1942 (*Fink*, No. 360, R. 43–57), exercised his power under Executive Order No. 9054, creating the War Shipping Administration, to utilize the facilities of the Board for the designation of bargaining units, while specifically reserving the Administration's rights in respect of the Board's absence of jurisdiction over personnel aboard WSA operated vessels. In consequence of this procedure and the Statements of Policy, government employees serving as seamen on WSA vessels enjoyed full exercise of the rights to organize and bargain collectively guaranteed by the National Labor Relations Act to persons privately employed.

This practical solution of the collective bargaining problem was expressly approved by the House Committee on Merchant Marine and Fisheries in reporting the bill which became the Clarification Act.[35] Pursuant to the arrangement between WSA

[35] H. Rept. 107, 78th Cong., 1st sess., pp. 23–24: "Suggestions have been made that the National Labor Relations Act

and the National Labor Relations Board, questions of representation among seamen employed on vessels husbanded by a general agent were referred to the Board for determination. The Board indicated the appropriate unit, and conducted elections to determine the bargaining representative, all in conformity with procedures identical with those regularly used by the Board under the National Labor Relations Act. Agreements for consent elections were signed in proper cases by the steamship company, as general agent for the WSA.

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be made applicable to seamen, not withstanding the fact that seamen employed by the Government would not be entitled to benefits under that act. The committee understands that it is the intention of the Administrator of the War Shipping Administration to avail himself of the facilities of the National Labor Relations Board for the purpose of aiding in the maintenance of collective bargaining processes and adjusting problems in such connection when consistent with the prime objective of a vigorous and successful prosecution of the war. Under the Executive order creating the War Shipping Administration, the Administrator has full authority to avail himself of such services, and in view of the expressed attitude in this connection, it seems unnecessary to consider further suggestions for making the National Labor Relations Act specifically applicable to seamen by statute.

"The Administrator's proposed solution to this problem would appear to assure seamen the substantial benefits of the National Labor Relations Act without infringing upon the well-established principles that the United States as an employer is not subject to the National Labor Relations Act. The Administrator could avoid subjecting disputes or other problems to the National Labor Relations Board in cases where this might interfere with the effective prosecution of his duties and functions. Accordingly, this solution of the problem seems to make legislative action unnecessary."

A similar practical arrangement was made in connection with the functioning of the National War Labor Board. General agents were directed from time to time, as occasion required, to comply with its procedures, orders and decisions in matters pertaining to both phases of its jurisdiction, *viz*, labor disputes and wage stabilization. Since all new collective bargaining agreements and all changes in subsisting agreements or employment practices required WSA's authorization and approval before being put into effect, the WSA made the submissions of all changes in wage rates, requesting the Board to notify directly the agents involved. WSA thus fully complied with the stabilization requirements relating to the wage structure of seamen, and the seamen had the right to invoke the dispute jurisdiction of the National War Labor Board as fully as if employed on privately operated vessels.[38]

[36] These practical arrangements in matters of collective bargaining and compensation were facilitated by the statutory definition of "employer" in the National Labor Relations and War Labor Acts. As stated by the War Labor Board in its Directive Order of August 31, 1945, *In re Maritime Cases*, 26 War Lab. Rep. 509, 512: "The question raised as to whether the operators should be named in the contract as employers, or, as in the last contract, as general agents for the War Shipping Administration has no real significance. Whatever the designation in the contract, the operators are the employers for the purposes of this dispute, as contemplated by the War Labor Disputes Act. * * *. Section 2 (d) of the War Labor Disputes Act * * * provides that the term 'employer' shall have the same meaning as in Sec. 2 of the National Labor Relations Act. The latter section

In like manner the WSA adhered, as a participating signatory employer, to the memorandum of agreement of December 18, 1941, designated "Statement of Principles" (46 C. F. R., 1943 Supp., p. 2124; 8 F. R. 3454), which created the Maritime War Emergency Board. This semi-official Board had earlier been appointed by the President, pursuant to an agreement between private shipping operators and the maritime unions, in order to deal with problems of wartime compensation and bonus which could no longer be adequately solved by the parties because of the restrictions of wartime secrecy. The War Labor Board advised the Maritime War Emergency Board that its bonus decisions need not be submitted to the former agency for stabilization review and the latter became thereby the final arbiter of all matters within its field of authority.

Not only the federal agencies, but the states as well have always recognized WSA seamen as employees of the United States, and the vessels as operated by the Government. With the exception of California, the authorities of all states which

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defines an employer as "any person acting in the interest of an employer, directly or indirectly * * *" [29 U. S. C. 152 (2)]. See, also, *In re Atlantic and Gulf Coast Agents of WSA*, 16 War Lab. Rep. 23, 24, 32–36; and cf. exchange of correspondence, 20 War Lab. Rep. at 465, 468. The solutions of the problems involved in the conversion from private to government operation were specifically examined and approved by Congress in connection with its consideration of the Clarification Act. H. Rept. No. 107, 78th Cong., 1st sess., pp. 15–17, 23–24, fn. 35, *supra*, pp. 72–3.

provide coverage for maritime workers in their unemployment compensation laws have not attempted to collect contributions with respect to seamen on vessels operated by WSA and husbanded by general agents, since "it is generally understood that * * * [such] workers * * * are considered to be Federal employees."[37]

5. *The precise terms of the general agency agreement, and the similarity of the duties of general agents to the other types of agents employed by the Government, establishes that the United States and not the agents was operating its vessels.*— Turning to the plain language of the provisions of the GAA 4-4-42 contract other than Article 3A (d) (which we have been mainly discussing), we submit there can be no question that the United States did not make the general agent operating agent or owner *pro hac vice* by the terms of that agreement. The contract throughout refers to the vessels as "operated hereunder", which means *operated by the United States* through WSA. Nowhere in the GAA 4-4-42 agreement is the vessel said to be operated by the agent, nor is the latter referred to as its "operator", as was done in the special Roosevelt form (*supra*, p. 59). On the contrary, the terms of GAA 4-4-42, which delimit the

[37] See *Issues in Social Security*, Report to the Ways and Means Committee of the House of Representatives by the Committee's Social Security Technical Staff pursuant to H. Res. 204, 79th Cong., 1st sess., p. 401; Hearings before the House Ways and Means Committee on H. R. 3736, 79th Cong., 1st sess., pp. 703–705.

agent's general duties and authority, are substantially identical with those of the berth agent and berth sub-agent agreements (BA 12–29–43 and BSA 9–22–42) as well as the time charter agent agreement (TCA 4–4–42).[38] The plain language of the several forms of agreement makes it obvious that each type of agent was equally confined to shoreside duties, and was employed exclusively to operate only certain parts of the "business" of the vessels assigned to the agent and not the vessels themselves. The agreements were designed for wartime operation of ships carrying primarily military cargo and sailing to secret destinations, wherever required, for logistic support of the armed forces. This necessitated direct operation by the Government and complete exclusion of the private companies from any part in the operation or control of the vessels themselves.

A comparative analysis of the GAA 4–4–42 agreement and the corresponding provisions of the other standard forms of wartime agency agreements (berth agent, berth sub-agent, time charter agent) demonstrates that the United States was operating owner in exclusive possession and control of its vessels and that general agents, no more than the other shoreside agents, were not permitted to act as op-

[38] The texts of the standard forms are published as follows: GAA 4–4–2, Title 46, Code of Fed. Regs., 1943 Cum. Supp., p. 11427 (7 Fed. Reg. 7562); TCA 4–4–42, *ibid.*, p. 11433 (7 Fed. Reg. 7565); BSA 9–22–42, *ibid.*, p. 11437 (7 Fed. Reg. 7567); BA 12–29–43, Title 46, Code of Fed. Regs., 1943 Supp., p. 2113 (8 Fed. Reg. 17512).

erating agents nor placed in possession of the vessels which the Government operated.

Article 1 of the general agency, time-charter agency, berth agency and berth sub-agency forms of agreements all are substantially identical. The agent is appointed as an agent, and not as an independent contractor, to manage and conduct for the United States the *business* of such vessels as may be assigned to it from time to time. The general agent, just like the berth agent and time-charter agent, is appointed to manage "the business," not to manage "the vessels."

Article 2 of the several forms of agreement is likewise substantially identical. The agent accepts the appointment and undertakes to manage and conduct "the business" of the vessels "in accordance with such directions, orders, or regulations" as the Government may prescribe.

Article 3 A (*a*) differs according to the type of agency agreement involved. In all forms except the BSA it provides that the agent shall "to the best of its ability" and subject to the orders of the United States "as to voyages, cargoes, priorities of cargoes, charters, rates of freight and other charges and as to all matters connected with the use of the vessels" perform the duties prescribed and, in the absence of orders, shall "follow reasonable commercial practices." In the general agency agreement, the duties prescribed are to "maintain the vessels in trade or such service as the United States may direct." The distribution of the performance

of the various shoreside functions of "husbanding" and "berthing" the vessel was prescribed in detail in WSA Operations Regulation No. 84 (Appendix C, *infra*, p. 171). The purpose and effect is explained in the letter of the General Counsel (Appendix B, *infra*, pp. 153–156, 162–169).

Article 3 A (b) (3 A (c) of BSA) is again substantially identical. General and other agents are alike required to collect all moneys due the United States under their agreement and "deposit, remit, or disburse the same in accordance with such regulations as the United States may prescribe from time to time," and to account for all moneys so collected or disbursed. In all forms this article is complemented by *Article 7*, referred to hereafter, which by defining what items are reimbursable to the various types of agents, indicates the kind of disbursements which each type of agent will be directed to make.

Article 3 A (c) of the GAA 4–4–42 agreement requires the agent "to equip, victual, supply and maintain the vessels," not in accordance with its independent judgment, but "subject to such directions, orders, regulations and methods of supervision and inspection" as the United States prescribes. This provision is complemented by *Article 14* of the GAA 4–4–42 agreement which provides that "unless otherwise instructed," the agent shall "*arrange* for the repair of the vessels." But in fact, as is well known, all maintenance and repairs were either effected or contracted for by the per-

sonnel of WSA's Maintenance and Repair Division in consultation with representatives of the agents. Actually no authority whatever was left to the agents.

Article 3 A (d) is the heart of the GAA 4-4-42 agreement but requires no further discussion (*supra*, pp. 61–76). *Article 3 A (e)* refers to bills of lading and is not material here. Nor are *Articles 4, 5 and 6*, providing that agents of the various types shall keep their accounts in the manner prescribed by the United States, shall be paid compensation in "such fair and reasonable amount as the Administrator, War Shipping Administration, shall from time to time determine," and may appoint subagents only subject to the approval of the Government.

Article 7 of the general agency, time charter agency, and berth agency and subagency forms of agreement contains the same basic provision that the United States shall reimburse the agent "for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required," subject to certain exceptions, "which are not directly and exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder." The GAA 4-4-42 agreement, in addition to these clauses common to all the forms, provides for reimbursement "to the extent not recovered from insurance" of "all crew expenditures" including without limitation "all disbursements for or on account of wages,

extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss of personal effects, maintenance, cure, vacation allowances, damages or compensation for death or personal injury or illness, and insurance premiums, required to be paid by law, custom, or by the terms of the ship's articles or labor agreements."

This provision for reimbursement is not a recognition of any personal responsibility of the agent for any of these items. It is nothing more than a description of the items which the agent will be required to disburse on behalf of the United States in accordance with Article 3A. Thus, judgments against the United States for wages, maintenance and cure, personal injuries, loss of personal effects or for any other cause of action arising out of the operation of WSA vessels do not have to be certified to the Treasury for appropriation, as is the case with vessels operated by the Army and Navy Departments. Such judgments and such claims against the United States, not reduced to judgment, are, in the case of WSA vessels, paid by the agent from the vessel's funds placed in his hands by WSA. It is the reimbursement of such payments which is provided for in Article 7. The circumstance that, by reason of the "unfounded claims" clause (Article 16, *infra*), payments can equally be made and reimbursed where claims and judgments are against the agent itself, provided the United States directs the agent to make such payment, does not give the provision effect as an ad-

mission that the agent is an "operating agent" in possession and control of the Government's vessels. In many instances, of course, reimbursement is not made by the United States, but by the underwriters on the protection and indemnity insurance for which the Government has contracted.

Article 8 of the general agency, time charter agency, and berth agency and subagency forms likewise contains identical basic clauses concerning indemnity and insurance. All forms provide that the United States shall without cost or expense to the agent procure or provide insurance against, or shall assume, "all insurable risks of whatsoever nature or kind relating to the vessels assigned hereunder" and shall defend, indemnify and save harmless the agents against "all loss, liability, damage and expense (including costs of court and reasonable attorneys' fees) on account of such risks and liabilities, to the extent not covered or not fully covered by insurance." The GAA 4-4-42 form differs only in adding a further provision expressly authorizing the United States to be a self-insurer with respect to everything except protection and indemnity riks. These provisions of Article 8 are complemented by *Article 16*, which, so far as here pertinent, is substantialy identical in the forms for every type of agency. It provides that the United States will indemnify and hold harmless the agents "against any and all claims and demands (including costs and reasonable attorneys' fees in defending such claim or demand, whether or not the claim or demand be found to be valid)" in connection

with "the operation or use of said vessels," or the performance by the agent of the duties provided by his contract, including "any and all claims and demands by passengers, troops, gun crews, crew members, shippers, third persons, or other vessels, and including but not limited to claims for damages for injury to or loss of property, cargo or personal effects, and claims for damages for personal injury or loss of life." The general agency form adds the words "and claims for maintenance and cure."

It seems clear that this insurance and indemnity afforded all types of agents against personal injury liability cannot be regarded as any evidence that, of all the agents thus indemnified, only the general agent was thought subject to some special liability, for the faults of others than its own independent employees, which liability normally would only exist if the general agent were an "operating agent." Nor can it be argued that such rights of indemnity redound to the benefit of third parties such as plaintiffs. *Twin Falls Canal Co.* v. *American Falls R. Dist. No. 2*, 59 F. 2d 19, 22 (C. A. 9), certiorari denied, 287 U. S. 638; *U. S. Shipping Board Merchant Fleet Corp.* v. *Dietrich*, 27 F. 2d 681, 683–684 (C. A. 2). Indeed, the GAA 4–4–42 provision for indemnity and insurance was obviously intended to cover cases where agents might be held liable for the actionable negligence of their own shoreside employees, not to extend such liability to cover negligence of the civil service masters and crews with whom the Government manned, navigated, and physically managed its vessels. As with the provision in Section 3 (j) of the Clarifica-

tion Act (57 Stat. 51), amending Section 3 (b) of the Act of June 6, 1941 (55 Stat. 244), so as to authorize the Government to insure the individual liabilities of agents (see 50 U.S. C. App. 1273 (b)), it was never contemplated that by undertaking to protect its agents against their undoubted personal liability for the actionable negligence of their own employees, the individual liability of government agents was to be deemed to be extended so as to cover equally the actionable negligence of those who were employees of the Government and not of the agents.

Articles 9 and 10, dealing with general average and salvage, are similar in the forms for all types of agency agreements. The agent is required to "comply fully with all instructions issued by the United States." The United States is to have complete control over salvage claims and awards. This is a significant provision of the GAA 4–4–42 agreement, showing that it is not an operating agency which is created. Ordinarily the operating company of the salvaging vessel includes with its claim as operator the salvage claims of the vessel's crew as well. The arrangement provided by Article 10 is therefore inconsistent with any idea that the general agent is to be operating agent and employer of the crew. It is the United States which, as employer of the crew, is to assert their claims.

Articles 11 and 12 provide for the rights of the parties to terminate the agreement and the action to be taken upon termination. They are substantially identical in the agreements for all types of agency.[38a] The basic provision is that upon termi-

nation "all property of whatsoever kind then in the custody of" the agent pursuant to the agreement "shall be immediately turned over to the United States, at times and places to be fixed by the United States."[38a] In the case of the general agency agreement, the words read "all vessels and other property of whatsoever kind." The added language relates to the situation covered more fully by the special *Article 20*, found only in the GAA 4–4–42 form. It was designed to cover the circumstance that the GAA 4–4–42 agreements which were first signed involved the retaking by the United States of government-owned vessels which, prior to February 25, 1942, had been bareboat chartered to the same companies as private operators under the form known as the "one-cent bareboat charter" (see *supra*, pp. 52–53). It was accordingly thought necessary to make special provision in Article 12 for the return of vessels in the event of termination retroactively or *in limine*.

Articles 13 and 15 are again substantially identical in all types of agreement. They provide that the United States shall have the benefit of any existing contracts or arrangements of the various types of agent in respect of any services, supplies, or facilities, and provide that the Government may control all such arrangements.

Articles 17, 18, and 19 are likewise substantially

[38a] Even the provision that termination shall not be effective until the arrival of the vessel in a United States port, upon which opposing counsel rely for evidence that the general agent is in possession of the ship, is common to the berth agency forms as well.

identical in all types of agreement. They provide for the manner in which the authority and control of the United States may be exercised under the agreements and contain the required warranties by a party contracting with the Government that no commissions have been paid or influence employed to obtain the contract.

This similarity between the various types of agency agreements, taken together with the division of shoreside duties between the general agent and the berth agent (*supra*, pp. 53–57)[38b] makes it abundantly plain that on neither of them did the United States confer the operating ownership or possession and control of its vessels. Their coordinate and correlative function show plainly that only the Government as principal of all three of its agents, shipmaster, ship's husband and berth agent, was the operating owner in possession and control of its ship.

6. *Examination of the Operations Regulations governing wartime direct government operation confirms that the agent did not operate the vessels.*—The foregoing analysis shows that general agents and berth agents, employed in connection with the operation of WSA vessels, were mere agents limited to the performance of shore-side non-navigating functions under detailed supervision, and that they lacked any of the authority or discretion exercised by operating agents or any other type of owner *pro hac vice* having the possession and control of vessels. All forms of agency agree-

[38b] See letter of the General Counsel, U. S. Martime Commission, Appendix B, *infra*, pp. 153–156, 162–169.

ments made the agent's every action subject to "such directions, orders, and regulations" as the United States should prescribe. And in fact, agents' activities were controlled in the most minute detail through extensive series of "general orders," "operations regulations," "traffic regulations," "fiscal regulations," "auditing and accounting instructions," "insurance instructions," "legal bulletins," and "medical directives" issued by the respective units of WSA pursuant to the provisions of Article 2 of GAA 4–4–42.

Supervision and compliance was maintained with the aid of some 5,000 employees located in the principal American and foreign ports, as well as by a small headquarters staff at Washington. Secrecy was promoted and even any influence of agents over the direct government operation of vessels was curtailed by the Government's practice of appointing separate general agents to husband its vessels and berth agents to attend to their port services. Discretion was kept to a minimum by the Government's execution of master contracts for the principal services and supplies which agents were supposed to obtain for vessels on the requisition of the Government's shipmasters.

Clear evidence of the controlling hand of the Government is furnished by the various Operations Regulations addressed to general agents. Despite continued ineffectual efforts of opposing counsel to establish the contrary, these speak plainly in the language of the operating owner, having authority, to the agent who is a mere channel of communication. They show that the agents were allowed no

authority and scarcely any influence over the masters and their operation of the vessels for the United States, but were rigorously confined to serving as a channel of communication between the Government and its shipmasters and the handling of the vessel's shoreside business operations. The circumstance that instructions and regulations issued by the WSA in some instances referred to the agents as "operators" is in nowise inconsistent. Read in context, it is obvious that the term was employed only in the sense that the general agent was a "shipping operator" and "operated" the vessel's "business", as provided by the GAA 4-4-42 agreement. This, however loose the usage, accords with the colloquial employment of the word "operated" in the shipping world. In the mouths of shipping men, "operated" and "operator" are used in respect to rendering any service to a vessel. Ordinarily, it is not intended to mean that the "operator" has possession and control of the vessel as operating owner for the voyage, so as to be engaged in its physical navigation and management through a shipmaster employed on its behalf.[39]

[39] Thus, for example, berth agents and sub-agents, who render only "port services," entirely separate and in addition to the "husbanding services" which are rendered by the general agent, are constantly said to "operate the vessel" in such port services. See, for example, the explanatory footnote to the standard form berth agency agreement "BA 12-29-43" as published in House Merchant Marine and Fisheries Committee, Doc. No. 4, *Compilation of Standard Contract Forms of the WSA* (usually called the "Gray Book"), p. 367: "Unless otherwise determined by the Administrator, when a

An examination of typical regulations is conclusive that the agents have not been granted authority over the masters.

Operations Regulation No. 4 provides: "*General Agents shall assign to each new vessel* * * * *a Master, Chief Mate, Chief Engineer and First Assistant Engineer,* approximately thirty (30) days prior to the completion and delivery date. All other officers and department heads, including Radio Operators and Chief Stewards, as authorized by War Shipping Administration, shall be assigned approximately ten (10) days prior to such date * * * The unlicensed personnel, except as otherwise provided for herein, shall be placed on the vessel effective as of the date of delivery to the General Agent."

Regulation No. 9, Supplement No. 1, provides: "*General Agents of War Shipping Administration are authorized and directed to employ* as a member of the crew of each EC–2 Liberty type vessel one Junior Third Mate * * * The terms of employment shall be in accordance with the General

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vessel assigned to an Agent or General Agent is required for operation in a service in which another operator is recognized by WSA as a regular berth operator or as being otherwise qualified to operate in such services, such operator is designated by WSA as the *Berth Agent of the United States to operate the vessel in such services.* The Berth Agency Service Agreement (BA) is the form of agreement entered into by the United States of America, acting by and through the Administrator, War Shipping Administration, and the berth or other operators approved by the Administration, appointing such operators as Berth Agents *to conduct the business of vessels* assigned to them from time to time by the United States." [Italics supplied.]

Agent's applicable collective bargaining agreement or as provided in Article 3A (d) of the Service Agreement."

Regulation No. 12, Supplement 1, provides: "It is clear from the provisions of Article 3A (d) of the General Agency Service Agreement that *Masters and crew members are employees of the United States,* but no specific provision is made in the GAA, TCA, or BA agreements as to whether other personnel are employees of the United States or of the Agents, General Agents, or Berth Agents. * * * *Excepting only additions to the vessel's crew* and employees of independent contractors, personnel employed by General Agents pursuant to Operations Regulation No. 12 are employees of the General Agent and not of the United States. Other personnel directly employed by Agents, General Agents, and Berth Agents (and their Sub-Agents) to perform work in connection with vessels or their cargo and special work incident thereto, including shore gangs, checkers, tallymen, watchmen, guards, coal trimmers, and other extra labor, but excluding relief officers, shore relief, and crew members, are employees of such Agents and not of the United States."

Regulation No. 15, Directive No. 2, provides: "The Master of a vessel has full discretion in signing on crew members and may reject any person seeking employment. * * *. Records shall be kept of the names of those rejected and of the reason for rejection and shall be submitted to the port office of the Recruitment and Manning Organiza-

tion of the War Shipping Administration in the port in which the rejection occurs."

Regulation No. 16, Directive No. 3, provides: "1. *When vessels are part of an active task force* or are operating in theatres of war, the *Masters are subject to the order of the Commanding Officers of the appropriate force* or theatre, and disobedience on the part of the Master and crew to such orders may subject the Master and crew to military discipline. 2. When vessels are not part of an active task force or are not operating in theatres of war, the *control and authority over the vessel rests solely with the Master, subject to the directions of the War Shipping Administration.*"

Regulation No. 30 provides: "*General Agents* * * * *are instructed to notify the masters* of such vessels to bolt down securely deep tank covers even when the deep tanks are used for carrying dry cargo."

Regulation No. 42 involves safety precautions aboard merchant vessels and provides: "*General Agents* * * * *are, therefore, directed to instruct the Master and Chief Engineer* aboard each vessel to ascertain, prior to proceeding to sea, the condition of the floor plates in the engine and fire rooms of their vessel * * * to take the necessary steps to have them firmly bolted."

Regulation No. 43 involves fuel oil conservation and provides: "*General Agents* * * * *are directed to instruct Masters* that wherever practicable, water shall be utilized for ballast purposes in lieu of fuel oil."

Regulation No. 46 requires General Agents to issue appropriate instructions to masters and others regarding WSA's regulations that *"responsibility for the stowage of cargo,* including the quantity to be loaded, the distribution of the cargo and the manner of stowage, *should rest with the Master."* Shore personnel of WSA and General Agents *"should go no further than to make suggestions,* subject always to the Master's approval or disapproval, and should be careful to avoid the direction or supervision of the stowage of cargo."

Regulation No. 48 (Revised) provides: *"General Agents are directed to instruct Masters* that stores, supplies and equipment are to be ordered through the vessels' *port agents."*

Regulation No. 50, involving crew advances in foreign ports, provides: *"General Agents are * * * directed to caution masters and crews* of vessels calling at ports in foreign countries to discontinue payments in Dollar currency and to refrain from transactions in United States money."

Regulation No. 51, Supplement 2, relates to pollution of navigable waters of the United States and provides: "All agents of the War Shipping Administration are hereby directed to give a copy of this Regulation to the Master of each vessel * * *. *Masters shall be instructed* to post this matter on the ships' bulletin boards or otherwise bring it to the attention of all ships' personnel."

Regulation No. 52 provides: "*General Agents are therefore directed to instruct Masters of all vessels* * * * to keep shaft alley doors closed at all times except when it becomes necessary to fill bearing reservoirs or make repairs. General Agents are further directed to *instruct Masters* that a notice to this effect must be posted adjacent to the shaft alley door * * *."

Regulation No. 54, relating to pilferage of cargo, provides: "*General Agents are directed to notify Masters* that even under wartime conditions, it still is the responsibility of the Master and his officers to see that cargo is delivered at destination free of damage and pilferage."

Regulation No. 56 requires *the General Agent to instruct masters* to familiarize themselves with protective measures relating to anti-gas preparations for merchant vessels.

Regulation No. 58 concerns the status of military and naval personnel assigned aboard merchant vessels and directs the general agents to *instruct* the masters in connection with and to comply therewith.

Regulation No. 62 provides: "* * * *each General Agent is instructed to advise both the Masters and Chief Engineers* of all vessels under their jurisdiction that fuel oil, reserve feed and fresh water piping system suctions are to be opened only on one oil and one water line when actually in use * * *."

Regulation No. 63, concerning the employment of staff officers, provides: "*General Agents* * * *

*are directed to employ * * * a Junior Assistant Purser* at a basic monthly salary of $120.00."

Regulation No. 81 provides: "General Agents of the War Shipping Administration *are directed to instruct Masters* to inform Armed Guard Officers as to the time and place of convoy conferences in sufficinet time to accompany the Masters to the conferences."

Regulation No. 83 provides: "*General Agents * * * are hereby directed to instruct ships' personnel* of the following practice to be observed in establishing quantities of Bunker Fuel Oil acquired or discharged * * *"

Regulation No. 87 directs general agents that "*All Masters and Pursers shall be instructed* to submit to the General Agent an accurate and detailed statement of expenses properly incurred for account of the vessel."

Regulation No. 99, Supplement 2, provides: "General Agents are expected to provide the War Shipping Administration complete information regarding any irregularities concerning ships' stores, supplies and equipment, including slop chest property. * * * *General agents are directed to instruct* all masters to prepare form SA-1, Master's Report of Loss, copy attached, on every occasion * * * *General Agents should advise masters* regarding their requirements of copies of the reports in addition to the copies required by the WSA."

All these regulations cover the minutiae of management and operation of the vessels and show that

the agent is denied any authority or control over the civil service masters and crews of the Government's vessels, but is solely confined to serving as a channel of command between the Division of Ship Operations of WSA and the Government's shipmasters, and to attending to the management of the vessels' shoreside business operations. They constitute the administrative practice evidencing the interpretation given the agency agreements by the parties themselves, and demonstrate that the authority of the agent stops at the water's edge. As the agent has no authority over the master, officers, and crew, so he should have no liability for their acts.

7. *The treatment by Congress of War Shipping Administration seamen establishes that the United States and not its agents was operating the vessels.*—Congress, with the passage of the Clarification Act (57 Stat. 45), expressly recognized the status of seamen serving on vessels owned by or bareboat chartered to the United States, through the War Shipping Administration, as government employees. By that Act, Congress provided for the exercise by such seamen of rights and benefits under the Jones and Social Security Acts which were available to seamen employed by private ship operators. Such rights had not been theretofore regarded as available to seamen who were government employees employed by WSA. Their right to United States Employees' Compensation Act

benefits had been regarded as exclusive. See Point V, *infra*.[40]

Prior to the date of the passage of that Act, such seamen, as employees of the United States, were not engaged in employment covered by the Federal Insurance Contributions Act and were not entitled to benefits under the old age benefit provisions of the Social Security Act. The Clarification Act provided for payment of contributions on behalf of such seamen and amended Section 1426 of the Internal Revenue Code (26 U. S. C., 1426 (i) and Section 209 of the Social Security Act (42 U. S. C., 409 (ó)) so as specifically to include under the definition of "employment" in those statutes the services performed by seamen employed on vessels owned by or bareboat chartered to the United States and operated by WSA.

Without this action by Congress it was not possible for such seamen, because of their government employee status, to enjoy the benefits which would have been theirs automatically had they been employees of the general agent. The committee reports leave no doubt that the status of such crew members as employees of the United States was fully understood and recognized by Congress. See S. Rept. 62, 78th Cong., 1st sess., pp. 5–6; H. Rept. 107, 78th Cong., 1st sess., pp. 2, 15; and further discussion in Point V, *infra*.

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[40] See *O'Neal* v. *United States*, 11 F. 2d 869 (E. D. N. Y.), affirmed, 11 F. 2d 871 (C. A. 2); *Posey* v. *T. V. A.*, 93 F. 2d 726 (C. A. 5).

Again, in connection with the Federal Employees' Pay Act of June 30, 1945, c. 212, 59 Stat. 295, 305, Congress recognized the status of WSA seamen as employees of the United States. Since they were all unclassified civil-service employees, it was unnecessary to make provision in the act for their pay. They were, however, expressly exempted from the ceiling on the number of federal employees. Accordingly, Section 607 (f) provided that, "Until the cessation of hostilities in the present war as proclaimed by the President, the provisions of this section shall not be applicable to * * * individuals * * * to whom the provisions of section 1 (a) of the [War Shipping Administration (Clarification)] Act of March 24, 1943 (Public Law Numbered 17, Seventy-eighth Congress), are applicable."

Further Congressional recognition of the status of such crew members as employees of the United States is found in the provisions of the Social Security Act Amendments of August 10, 1946, c. 951, 60 Stat. 978–981 (26 U. S. C. 1606 (f)), which amended the Federal Employment Tax Act expressly to authorize the states to bring services performed by seamen on interstate voyages under the coverage of their unemployment insurance laws. Several states, including the leading maritime states of California and New York, had already taken steps to cover such seamen, at least to the extent of vessels operated from a single state. But to permit all maritime states to join in an interstate agreement for

exchange of wage information among the unemployment insurance authorities of participating states which was to serve as a basis for the payment of benefits to seamen employed on vessels operating out of more than one state, it was necessary to amend the federal act so as to authorize the states to cover seamen in the same manner as local employees. In thus amending the act, Congress expressly excluded from its coverage the crews of vessels operated by WSA. Congress instead made specific provision for payment of benefits to unemployed seamen formerly employed by WSA on vessels owned by or bareboat chartered to WSA or the Maritime Commission.

This was accomplished by the addition to the Social Security Act of Title XIII (42 U. S. C. 1331–1336), authorizing the Federal Security Administrator to enter into agreements with the several maritime states for the payment of benefits to former WSA seamen during a so-called reconversion period lasting until June 30, 1949. Under such agreements, the states pay compensation to such seamen as if they were covered under the state law, and in return obtain reimbursement from the Federal Security Administrator. Absent such arrangements, the Federal Security Administrator is directed to make the payments directly to the former government seamen. The legislative history evidences express recognition that WSA seamen were employees of the Government, and not of its agents so as to be taxable by the states. The Committee reports of both

houses are unanimous in this regard. Thus, H. Rept. No. 2526, 79th Cong., 2d sess., p. 7, states:

> The committee recognizes that because of the fact that the great bulk of maritime work has been carried on by employees of the Federal Government since the beginning of the war the mere coverage of private maritime employment under the laws of the several States will not afford full protection for most maritime workers for whatever unemployment may occur in the next 2 or 3 years. The bill therefore authorizes the Federal Security Administrator to make arrangements with the States under the terms of which the States would extend credit for Federal maritime wages in calculating benefits under their own State laws. The bill further provides that the Federal Government will reimburse the States for such costs as are incurred in the process of crediting Federal maritime wages and paying benefits thereon, which would not otherwise have been incurred.

See also H. Rept. No. 2447, 79th Cong., 2d sess., pp. 7–9; S. Rept. No. 1862, 79th Cong., 2d sess., pp. 5–6.

But most significant of all are the statements in connection with the Government-seamen's Relief Bill (H. R. 4873, 80th Cong., 2d sess.) which was introduced, at the request of representatives of seamen and other third parties, for the purpose of reviving the rights of seamen and other third persons to sue the United States in cases where these rights have become time-barred while suits have

n improperly brought against the Government's
neral agents or shipmasters for negligence of the
ws of government vessels. This bill passed the
use on June 8, 1948 (94 Cong. Rec. 7389), was
ferred to the Senate Judiciary Committee on
ne 9, 1948 (94 Cong. Rec. 7503), but could not be
ed on before the adjournment of Congress.[40a] In
vorably reporting the bill, the House Judiciary
mmittee said (H. Rept. 2060, 80th Cong., 2d
s., p. 2):

> The Supreme Court then, in 1942, in *Brady* v. *Roosevelt Steamship Company* (317 U. S. 575), held that the Suits in Admiralty Act, by furnishing an in personam remedy against the United States, did not free the agent from liability for the torts of its own employees. This case was followed in 1946 by the Court's decision in *Hust* v. *Moore-McCormack* (328 U. S. 707). These cases together were popularly taken as an endorsement by the highest court in the land of the theory of duality of remedy in all cases. Accordingly, many litigants, relying upon these decisions, brought their suits against the agent only because of the opportunity for a jury trial which many of them preferred. Then the Supreme Court on June 23, 1947, handed down its decision in *Caldarola* v. *Eckert* (332 U. S. 155), which clarified, in the opinion of the committee, the rule previously announced so as to make it plain that the agent while liable for the negligence of its own employees was not liable for the negligence of the civil-service

[40a] The bill has been reintroduced as H. R. 483, 81st Cong., sess.

masters and crews with whom the United States manned the vessels. For the negligence of those, the United States was the only responsible party. The committee believes that litigants should not be made the victims of the legal confusion regarding the proper remedy in such cases, and are not responsible for the conditions brought about by the lack of clarity in the opinions of the Supreme Court.

8. *Conclusion.* The materials which have been set forth above serve only as a partial illustration of the complex nature of the vital operation in which the War Shipping Administration engaged, and the practical solutions which were given to the problems which that Administration faced, as it "* * * actively engaged in operating * * * the largest merchant marine in the world's history. * * *" H. Rept. No. 107, 78th Cong., 1st sess. at p. 12. At all times during this operation, the legal relationship of employer and employee between the United States and its civil-service crew members was specifically maintained. We submit that at no time was any action ever taken that would justify the conclusion that the general agents were operating agents or that the seamen were employees of the Government's shoreside agents.

IV

THE UNITED STATES AS OPERATING OWNER IN EXCLUSIVE POSSESSION AND CONTROL OF ITS VESSELS, AND NOT ITS GENERAL AGENTS, WAS SOLELY RESPONSIBLE FOR THE ACTS OF THE MASTER AND CREW

We have seen that the United States was in exclusive possession and control of its vessels through its ship masters who were its direct and independent agents for the navigation and physical management and operation of its vessels. Shoreside agents of the Government, whether general agents, berth agents, or berth subagents, were restricted to operating various parts of the vessels' business and carefully excluded from any authority or control over their navigation and physical management and operation. Agents served as an ordinary channel of communication between WSA and its ship masters, and assisted the latter with the payrolls and procurement of supplies and men, but nothing more (Point III, *supra*). In such circumstances, the ship's husband or shoreside agent of a private ship operator would plainly not be held liable. We believe that a consideration of the applicable decisions with respect to private ship operations, and a review of the absence of any reason for applying a less favorable rule to government agents, demonstrates that general agents of the United States should likewise not be held liable for the acts of the master and crew, whether to seamen or other third parties.

1. *Only one who is owner or owner pro hac vice operating the vessel is liable for the acts of the master and crew in its navigation and management.*— In private shipping operations it is definitely established that an agent, unless the vessel is demised to him as operating agent, so as to make him owner *pro hac vice* or temporary operating owner in place of the vessel's general owner, cannot be held liable for the acts of the master, officers and crew. The principle is so deep-rooted that it appears only once to have been questioned, even obliquely, before the courts. In *Cox* v. *Lykes Bros.*, 237 N. Y. 376, suit was brought against the Shipping Board Fleet Corporation of World War I and Lykes Bros., its agent for various limited purposes. Lykes Bros., not being operating agent, had been dismissed by the trial court (204 App. Div. 442, 443). The question on appeal was whether the Fleet Corporation, which admittedly was an operating agent to whom the vessel were demised, was liable. Judge Cardozo observed of the status of the Fleet Corporation (at p. 383):

> * * * In operating the *Bethlehem Bridge*, it acted for itself alone, with possession and control complete and unrestricted. The contracts of employment were its contracts; the stores its stores; the payments for wages, as well as for all other expenses, its payments; the profits its own, and its own the losses. If the action were for wages proper, its liability would not be questioned. Lykes Brothers were merely agents, and the

> undisclosed principal [The Fleet Corporation] was chargeable upon contracts made for its account in the business of the agency.

No other case is known involving even an attempt to impose liability on the agent of a vessel which was not demised to the agent, but for which he was a mere ship's husband or shoreside agent without possession, command, and control. A counterpart to the distinction between operating agents to whom the ship is demised and husbanding agents operating only the vessel's shoreside business, is found in the similar distinction between bareboat charterers to whom the ship is demised and time or voyage charterers, who only hire the reach and burden of the vessel. In the charter situation numerous cases establish that the critical test is whose agent or employee the vessel's master is. Nothing less than exclusive authority and control over the master can make the charterer the principal of the master and the owner *pro hac vice* or temporary operating owner of the vessel. *Reed* v. *United States,* 11 Wall. 591, 600; *United States* v. *Shea,* 152 U. S. 178.

It is well settled that, if there is any doubt that the general owner has divested himself of possession and control and has constituted another operating owner in possession and control, "then the general owners must be deemed such for their rights and authority continue until displaced by some clear and determinate transfer of them; * * *. The legal presumption is in favor of the continuance

of ownership and against any transfer * * *."
See *Hagar* v. *Clark*, 78 N. Y. 45, 50; *Raymond* v. *Tyson*, 17 How. 53, 63–64; *Pacific Imp. Co.* v. *Schubach-Hamilton S. S. Co.*, 214 Fed. 854 (W. D. Wash.); *Grimberg* v. *Columbia Packers' Ass'n*, 47 Ore. 257, 270–271.

The role of the ship's husband in procuring the crew for employment by the master on behalf of the operating owner is immaterial so far as liability is concerned. It is elementary that only the principal, and not the agent procuring the engagement, is responsible for the torts of such other agents and employees. In the words of Justice Story (*Agency* (9th ed., 1882), Sec. 313, p. 385):

> But no action will ordinarily lie against an agent for the misfeasance, or for the negligence of those whom he has retained for the service of his principal, by his consent or authority, any more than it will lie against a servant who hires laborers for his master at his request, for their acts; unless, indeed, in either case, the particular acts which occasion the damage are done by the orders or directions of such agent or servant. The action, under other circumstances, must be brought either against the principal or against the immediate actors in the wrong.[41]

[41] To the same effect see 1 Labatt, *Master and Servant* (2d ed., 1913) pp. 102–103: "It is well settled that, where an employee, acting under the express or implied authority of his principal, engages servants to perform work for the benefit of his employer, the principal, and not the employee, is in law the master of the servants so engaged. This doctrine is

"In the case of actionable negligence the rule is well settled * * * that the negligence of a subordinate employee or subagent is not to be imputed to a superior employee or agent, but only to the master or principal." *Handley* v. *Lombardi*, 122 Cal. App. 22, 29; *Dowler* v. *Johnson*, 225 N. Y. 39.

It is absolutely essential to the status of an operating agent or owner *pro hac vice* that he be placed in exclusive possession, command, and control of the ship; and loose expressions, in maritime agreements, concerning the delivery and redelivery of the vessel are not controlling. Such words have been repeatedly held not to evidence a demise or transfer of possession and control which imposes liability for negligence of the master and crew. *Clyde Commercial S. S. Co.* v. *West India S. S. Co.*, 169 Fed. 275, 277 (C. A. 2); *Grimberg* v. *Columbia Packers' Ass'n*, 47 Ore. 257, 270–271; *The Volund*, 181 Fed. 643, 665–667 (C. A. 2); *Adams* v. *Homeyer*, 45 Mo. 545, 551–552. In their context, the terms are more readily understood as referring to the commencement and termination of the contract than to a transfer of the possession, control, and management of the vessel. *Grimberg* v. *Columbia Packers*, *supra*. See fn. 24, *supra*, p. 57. So long

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an obvious and necessary consequence of the fact that, in the case supposed, the power of controlling the servants, even though it may normally be exercised by the agent after they are hired, really resides in the principal, and may at any time be called into active exercise." See, also, *Restatement of Agency*, sec. 79, comment (a).

as the general owner preserves his ultimate authority over the master, he continues as operating owner and the other party does not become owner *pro hac vice* liable for faults in the navigation and management of the vessel, even though the master is subject to his orders respecting the business operations of the voyage. *Worrall* v. *Davis Coal & Coke Co.*, 122 Fed. 436, 438 (C. A. 2) (negligent damage to vessel); *The Volund*, 181 Fed. 643, 665–667 (C. A. 2) (negligent navigation); *Grimberg* v. *Columbia Packers' Ass'n*, 47 Ore. 257, 270–271 (negligent personal injury). Absent the exclusive authority over the master as well as possession and control of the vessel which result from a demise, the agent is in the same situation as the charterer to whom only the use of the ship is delivered and not the ship itself, and vicarious liability for the negligence of the master and crew remains exclusively that of the general owner. *The Volund, supra; Grimberg* v. *Columbia Packers' Assn., supra;* cf. *Thorp* v. *Hammond*, 12 Wall. 408, 416.

The right of seamen to recover wages, and maintenance and cure, follows the same rule. It is well settled that whoever is the operating owner for the voyage is liable for wages, maintenance, improper discharge, and all other obligations due the seamen. But the seaman's statutory contract is with the master and if he is to recover from another, he must establish that the party sought to be held liable was in fact the operating owner of the vessel for the voyage and not a time or voyage charterer or

agent for a limited purpose, nor yet a general owner who has parted with the operation and control of his vessel to another who operates it as owner *pro hac vice*. *Everett* v. *United States*, 284 Fed. 203 (C. A. 9), certiorari denied, 261 U. S. 615; *The Del Norte*, 119 Fed. 118, 123 (C. A. 9); *The John E. Berwind*, 56 F. 2d 13 (C. A. 2); *Bacarat* v. *Andrew F. Mahoney Co.*, 1933 A. M. C. 1652, 1656 (N. D. Calif.); *Roberts* v. *United States S. B. Emergency Fleet Corp.*, 240 N. Y. 474, 477; *Cox* v. *Lykes Bros.*, 237 N. Y. 376. To hold liable a ship's husband who has merely "procured" the master and crew for a disclosed principal would be contrary to the express provisions of the statutes and the law maritime, and unrealistic in fact. As the court observed in *Hughes* v. *Southern Pacific Co.*, 274 Fed. 876 (S. D. N. Y.):

> Shipping articles constitute a contract executed by and between the master of a vessel, as agent for the owners, and each member of the crew shipped before a United States shipping commission. The master virtute officii employs and discharges the seamen * * *.

Absent the necessary language and intent to create a demise of the vessel and to constitute an agent or charterer as operating agent or owner for the voyage, it is plain that if the principal is disclosed his agent is not liable for contracts made on this principal's behalf. *Whitney* v. *Wyman*, 101 U. S. 392, 396; *Parks* v. *Ross*, 11 How. 362, 374; *Hodgson* v. *Dexter*, 1 Cranch 345, 363–364; *Feldman*

v. *American Palestine Line*, 18 F. 2d 749, 750 (C. A. 2).

We therefore submit that, unless a different rule is to be applied to government than to private agents, there is no basis for holding liable mere ships' husbands, such as petitioner and the Government's other general agents.

2. *Neither before nor after the Clarification Act has there been any basis for applying a different rule to government agents who are not operating the vessel.*—Application to general agents under GAA 4–4–42 of these settled rules, governing the liability of agents of disclosed private principals, similarly bars liability here. And far from discriminating against the Government's general agents because government service is involved, we believe that factor provides a special reason for invoking the rule in these cases.

a. For a hundred years it has been settled that the rule that only the principal and not the superior agent or employee is liable for the acts of the subordinate (*supra*, pp. 105–6) has been applied with even greater rigor to public officers and agents. Even where the government agent exercises direct supervision and control over subordinate government employees charged with fault, the government agent sued does not thereby become a tort-feasor and cannot be held liable for their wrongs. "A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the

subagents or servants or other persons properly employed by or under him, in the discharge of his official duties." *Robertson* v. *Sichel*, 127 U. S. 507, 515–517; *Malewicki* v. *Qvale*, 298 Fed. 301 (C. A. 8); *Zinkhan* v. *District of Columbia*, 271 Fed. 542, 545 (C. A. D. C.); *Jones* v. *Kennedy*, 121 F. 2d 40, 44 (C. A. D. C.), certiorari denied, 314 U. S. 665; *Riggin* v. *Brown*, 59 Fed. 1005 (D. Md.); *Lajoie* v. *Milliken*, 242 Mass. 508.

Nothing in the case of *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, indicates a disposition to overrule this established principle. *Emergency Fleet Corp.* v. *Lustgarten*, 280 U. S. 320, was specifically overruled (317 U. S. at 578) so far as the latter had held government agents immune from independent liability for the torts of their own employees merely because government money would be used to indemnify the agent. But although the Roosevelt agreement was an operating agency under which the Government demised its vessels to the agent as owner *pro hac vice* to man and operate with its own masters and crews (*supra*, pp. 50–1, 58–9, *infra*, p. 125), this Court carefully specified that it held only "that the Suits in Admiralty Act did not deprive petitioner of the right to sue respondent for damages for his maritime tort." Its decision reached no further: "Whether a cause of action against respondent has been established is, of course, a different question" (317 U. S. at 585).

Hust v. *Moore-McCormack Lines*, 328 U. S. 707, and cases purporting to follow it aside, the rule that

only the principal and not the superior agent is liable has been applied consistently to general agents husbanding vessels for the United States. *Caldarola* v. *Eckert*, 332 U. S. 155, 159; *Publicker Commercial Alcohol Co.* v. *American-Hawaiian S. S. Co.*, 165 F. 2d 1002, 1006 (C. A. 3); *McGowan* v. *J. H. Winchester & Co.*, 168 F. 2d 924 (C. A. 2), certiorari denied, 335 U. S. 861 (November 8, 1948, Nos. 311, 312, this Term); *Williams* v. *American Foreign S. S. Corp.*, 65 F. Supp. 900 (S. D. N. Y.); *Murray* v. *American Export Lines*, 53 F. Supp. 861 (S. D. N. Y.) [42]

[42] Before *Hust*, almost every case cited as authority for the liability of agents under GAA 4-4-42 was a case where the obligations of the defendant went far beyond those of a mere general agent. In *Carroll* v. *United States*, 133 F. 2d 690 (C. A. 2), and *McCormick* v. *Moore-McCormack Lines*, 54 F. Supp. 399 (E. D. Pa.), defendants were owners *pro hac vice* under a bareboat charter when the seamen signed articles and the voyage began. *Supra*, pp. 52–3, *infra*, p. 117. In *Moser* v. *Standard Oil Co. of New Jersey*, 60 F. Supp. 6 (E. D. Pa.), and *Schuller* v. *Matson Nav. Co.*, 43 N. Y. S. 2d 566, defendants were general owners in possession, operating their own vessels for the United States. In *Moss* v. *Alaska Packers' Assn.*, 79 Cal. App. 2d 857, and *Lewis* v. *U. S. Navigation Co.*, 57 F. Supp. 652 (S. D. N. Y.), the shipping articles did not mention the Government, and on the facts the defendants were held liable as agents for undisclosed principals. *Gay* v. *Pope & Talbot*, 183 Misc. 162, merely held that whenever an agent was independently liable to third persons for the negligence of its own employees in connection with the operation of a government vessel, such third persons, if seamen on the vessel, might enforce such independent liability by suit under the Jones Act with the benefit of jury trial and the absence of contributory negligence and assumption of risk defenses. This, as pointed out, *supra*, p. 36, accords with the Government's position in these situations.

b. The principle embodied in the loaned servant rule confirms that the right of government seamen to bring Jones Act suits against government agents does not of itself justify imposing vicarious liability on these agents. Even if the general agent may be deemed in a special sense the "employer" of the crew so as to permit them to bring suit under the Jones Act (see *Caldarola v. Eckert*, 332 U. S. 155, 159),[43] still he is not the operating agent or owner *pro hac vice* of the vessel and employer *pro hac vice* of the master and crew for purposes of vicarious liability, since the work of the master and crew in the navigation, management, and operation of the vessel is not his work nor subject to his control. Vicarious liability is imposed by the law because the servant is doing his employer's work and the latter is bound to see that his work is so conducted that others are not injured; but this responsibility cannot extend beyond the limits of the employer's work, and if the employee is doing his own work, or that of another, the employer is not answerable for his negligence in the performance of it. So here, the work which the master and crew are doing is work of the United States which it has not delegated to the general agent, and the latter has no authority or control over the work and therefore no responsibility for the negligence of the master and crew in its execution.

[43] As pointed out, *supra*, p. 36, fn. 13, the Jones Act, unlike the Federal Employers' Liability Act, refers only to injuries in the course of employment and does not appear to require an employer-employee relationship.

Only the United States, as the principal whose work the master and crew are doing, can be held liable for their negligence or misconduct. *Denton* v. *Yazoo & M. V. R. R. Co.*, 284 U. S. 305, 308–309; *Norfolk & W. Ry. Co.* v. *Hall*, 57 F. 2d 1004, 1008 (C. A. 4); *McLamb* v. *E. I. DuPont De Nemours & Co.*, 79 F. 2d 966 (C. A. 4); *Hardy* v. *Shedden Co.*, 78 Fed. 610, 613 (C. A. 66); *Byrne* v. *Kansas City, Ft. S. & M. R. R. Co.*, 61 Fed. 605 (C. A. 6).

c. With respect to claims for maintenance, cure, and wages under the federal maritime law, the same situation prevails as in the case of liability for the negligence of the master and crew. The seaman's right to maintenance, cure, and wages arises out of his contract of employment—the shipping articles, which are between the seamen and the master as representative of the operating owner to whom the vessel belongs for the voyage. 46 U. S. C. 713, 564; see *supra*, pp. 55, 63–6, 107–9. Accordingly, under established principles, a government seaman's claim in this respect, as in respect of his rights under the Jones Act for negligence of the Government's master and crew, may not be asserted against the general agent, but only against the United States, the disclosed principal named in the shipping articles as the operating owner to whom the vessel belongs for the voyage. *Shilman* v. *United States*, 164 F. 2d 649, 652 (C. A. 2), cer-

tiorari denied, 333 U. S. 837; *Conlon* v. *Hammond Shipping Co.*, 55 F. Supp. 635 (N. D. Calif.)."

For these reasons, we urge that the present case requires the application of the traditional rules of liability as applied in the *Caldarola* case, and this Court should hold that in accordance with that case the liability of a government general agent does not exceed that of the similar agent for a private principal.

V

THE CLARIFICATION ACT REQUIRES THAT AFTER ITS ENACTMENT GOVERNMENT-EMPLOYED SEAMEN SHALL VINDICATE THEIR RIGHTS EXCLUSIVELY BY SUIT AGAINST THE UNITED STATES UNDER THE SUITS IN ADMIRALTY ACT

Thus far, we have discussed the absence of any right by third persons, including seamen, to recover against government agents for the acts of the master and crew of WSA vessels (Points II, III, IV, *supra*). Even assuming, however, that other third persons are entitled to recover against government agents (which we deny), government seamen may not do so after the enactment of the War Shipping Administration (Clarification) Act of March 24, 1943 (c. 26, 57 Stat. 45). The purpose of Congress, in the Clarification Act, to make suit against the United States the exclusive remedy of government seamen is obvious from the literal language of Section 1 of the Act, which

[11] See also *Gaynor* v. *Agwilines*, 169 F. 2d 612, 617 (C. A. 3) now pending on writ of certiorari, No. 430; *Aird* v. *Weyerhaeuser S. S. Co.*, 169 F. 2d 606, 609 (C. A. 3) now pending on petition for a writ of certiorari No. 291 Misc.

gave government seamen "all of the rights [of] seamen on privately * * * operated * * * vessels", but directed that such rights shall "be enforced pursuant to the provisions of the Suits in Admiralty Act." Considered against the background of the rights of government-employed seamen prior to its introduction and the legislative history of its enactment, there does no seem to us to be much doubt but that the language of the Act must be literally interpreted and applied to bar government-employed seamen from any remedy other than by suit against the United States.

1. *The background of the Clarification Act indicates that suit was to be brought only under the Suits in Admiralty Act.*—The background of the Clarification Act lies in the rights and remedies of seamen, both government and privately employed, in February and March 1942, when WSA was created and proceeded to requisition the American merchant fleet and to inaugurate its plan for direct government operation of the larger part of that fleet with the assistance of existing shipping organizations as shoreside agents of various types. It must be recalled that prior to that time the entire merchant fleet was privately operated and ninety per cent of its 1,375 ocean-going vessels were privately owned. Ten per cent were government-owned but were demised by the Maritime Commission for private operation under the one-cent bareboat charters. *Supra*, pp. 48–52.

The seamen employed to operate both privately owned and government-owned vessels had rights against their private employers under the Jones Act and the general maritime law. In addition, those serving the operators of government-owned but privately operated vessels had rights under the general maritime law which were enforceable against the United States pursuant to the Suits in Admiralty Act.[45] Such seamen also had full rights under the Social Security legislation.

In February and March 1942, the only government-operated vessels manned by civilian merchant seamen were those of the Army Transport Service. Such vessels were public vessels of the United States employed exclusively as such and it was generally believed that the civilian government employees who manned them had no rights other than those under the United States Employees' Compensation Act. Not only were those rights thought to be exclusive (cf. *O'Neal* v. *United States*, 11 F. 2d 869 (E. D. N. Y.), affirmed, 11 F. 2d 871 (C. A. 2); *Posey* v. *T. V. A.*, 93 F. 2d 726 (C. A. 5)), but until much later it was believed that suits for personal injury and for wages, maintenance and cure could not be brought under the Public Vessels Act. Cf. *American Stevedores* v. *Porello*, 330 U. S. 446,

[45] They had no rights enforceable against the United States under the Jones Act because the United States was merely the reversionary owner out of possession, and the Jones Act, unlike the general martime law, does not give a right *in rem* enforceable against an owner who is not himself operating his vessel.

453, 458; *United States* v. *Loyola*, 161 F. 2d 126 (C. A. 9), and *Jentry* v. *United States*, 73 F. Supp. 899, 902 (S. D. Calif.).

When the War Shipping Administration embarked on its plan of direct government operation of its vessels with government-employed seamen, it was thought desirable, in view of the temporary character of their government employment, to preserve their rights under Social Security legislation and to remove them from what was believed to be the exclusive coverage of the United States Employees' Compensation and Civil Service Retirement Acts. But some of these temporary government seamen might have relied on these latter rights. Moreover, many of the government vessels had been converted from private operation under the one-cent bareboat charters to government operation under the general agency plan, in the course of voyages which had been commenced prior to the conversion. *Supra*, pp. 52–3, fn. 20. The rights of such seamen were, naturally, obscure. When they signed articles for the voyage they were private employees of private operators. Some of the seamen might have relied on the continuation of that status. That situation posed the question of whether their private status was instantaneously defeated by the change in the contract between the United States and the shipping company which had employed them. While it was later held that this was not so (see *Carroll* v. *United States*, 133 F. 2d 690 (C. A. 2); *McCormick* v. *Moore-McCormack Lines*, 54 F. Supp. 399 (E. D. Pa.)) there were, not unnaturally, doubts on both grounds.

The solution was apparent. The War Shipping Administration asked Congress for legislation which for the future would clearly exclude such temporary government employees from coverage by the United States Employees' Compensation and Civil Service Retirement Acts, and would grant them the rights of privately employed seamen to proceed under the Jones Act and the general maritime law. As befitted government employees, however, the rights thus granted were to be enforced only by suit against the United States. To preserve the rights of seamen during the change-over period to proceed against the private operators by whom they had been employed, if they desired, or to claim the benefit of the United States Employees' Compensation Act, or to avail themselves of the rights granted by the new legislation, it was provided that during the period beginning October 1, 1941, and continuing until the enactment of the new law on March 24, 1943, the seamen should have the right to enforce whatever rights they might have previously had or to elect the benefits of the new legislation.

In our view, this background of the Clarification Act makes it plain that the intention for the future was to couple the grant to government seamen of the rights of privately employed seamen with the requirement that those rights be enforced exclusively by suit against the United States.

2. *The legislative history of the Clarification Act shows suits were to be brought only under the Suits*

in Admiralty Act.—The legislative history of the Clarification Act, viewed against this background, admits of but one conclusion. It is the mandatory directive of the Act that suit to enforce the rights of government-employed seamen shall be brought only under the Suits in Admiralty Act. The hearings and debates, although extending over two sessions of Congress, are brief.[46] The aspects of the legislation which received particular attention confirm that Congress regarded it as essential that government-employed seamen be prohibited from proceeding against anyone except the United States as their employer. As stated by the court below in the companion case of *Fink* v. *Shepard S. S. Co.*, No. 360, the legislative history "demonstrates conclusively" that Congress required exclusive resort to suit against the United States because it intended to withhold the right of jury trial "from Govern-

[46] The steps in enactment follow: Introduced on July 22, 1942 (H. R. 7424, 77th Cong., 2d Sess.); hearings were had September 2, 1942, before the House Committee on Merchant Marine and Fisheries, which reported the bill on October 15, 1942 (H. Rept. No. 2572, 77th Cong., 2d Sess.). It passed the House on October 19, 1942, and in the Senate was reported on October 22, 1942, by the Committee on Commerce (S. Rept. No. 1655, 77th Cong., 2d Sess.). Recommitted, it was again reported on December 4, 1942 (S. Rept. No. 1813, 77th Cong., 2d Sess.). Following adjournment, the bill was reintroduced on January 6, 1943 (H. R. 133, 78th Cong., 1st Sess.) and was reported on February 8, 1943 (H. Rept. No. 107, 78th Cong., 1st Sess.). It passed the House on February 15, 1943, and in the Senate was reported on February 22, 1943, from the Committee on Commerce (S. Rept. No. 62, 78th Cong., 1st Sess.) and passed on March 2, 1943. A conference report of March 12, 1943 (H. Rept. 248, 78th Cong., 1st Sess.) was accepted by both houses.

ment-employed seamen for the duration of the war" (192 P. 2d at 268).

The Clarification Act was first introduced on July 22, 1942, as H. R. 7424, 77th Cong., 2d sess., and hearings were held on September 2, 1942. Immediately, the fact that jury trial would not be permitted by the bill, a matter which would have been of no consequence had it not been recognized that its purpose was to make suit under the Suits in Admiralty Act the exclusive remedy, became the object of strenuous objections. The most serious objections were those of the legislative representatives of the National Maritime Union, one of the unions which previously in May and June 1942 had entered into the over-all collective bargaining arrangement with WSA. A statement submitted by William L. Standard, then General Counsel of the National Maritime Union, made the following argument (House Merchant Marine and Fisheries Committee, *Hearings on H. R. 7424, 77th Cong., 2d Sess.*, p. 31):

> * * * If, therefore, H. R. 7424, in excluding merchant seamen from the benefits of the United States Employees' Compensation Act, afforded to merchant seamen employed on Government vessels, exactly the same rights now enjoyed by them as employees of privately owned vessels, the unions would naturally have no opposition to the adoption of such a bill.
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> Unfortunately, section 1 of H. R. 7424, at line 6, page 2, provides the following:

"Any claim referred to in clause (1) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the suits in admiralty act, notwithstanding the vessel on which the seaman is employed, is not a merchant vessel within the meaning of such act."

In requiring merchant seamen to present their claims under the suits in admiralty act, a definite limitation is imposed upon the exercise of their rights.

Under the suits in admiralty act, while it is true that merchant seamen enjoy the benefits of the Jones Act, and their rights are adjudicated pursuant to that act, the trial takes place before a Federal judge without the benefit of a jury trial.

* * * * *

The N. M. U., therefore, recommends that, in order that merchant seamen employed by the War Shipping Administration should not be deprived of a trial by jury, after the word "Act," at line 11, page 2, of the bill, the following be inserted:

"*Provided, however,* That the claimant may, at his election, maintain an action for damages at law, with the right of a trial by jury; and in such action the claimant may enjoy the same rights, benefits, exemptions, privileges, and liabilities of seamen employed on privately owned and operated vessels."

Attorney General Biddle submitted a reply, on behalf of the Department of Justice, explaining why jury trial was not compatible with the interest

the United States. He stated in part (*ibid.*, 3):

> I have no wish to oppose jury trial in these cases if to the Congress the adoption of such a policy seems wise. There are certain considerations which I think should be taken into account in reaching your conclusion on the issue of policy involved.
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> * * * * *
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> (2) It has been found necessary in protecting the security of the Nation to adopt an amendment to admiralty rule 46. It has been found that in the course of admiralty litigation information is made available to the enemy detrimental to the national safety and detrimental to the lives and welfare of seamen. The amendment to admiralty rule 46 contemplates careful surveillance of admiralty litigation and control of the proceedings to prevent leakage of information that might be of value to the enemy and of danger to the United States. The scheme of this protection is that every libel is submitted to me; and my assistants, in collaboration with appropriate officers of the Navy, examine the litigation. If the Navy Department is of the view that information stated in the pleadings or liable to be developed in the course of the trial would be of value to the enemy, admiralty rule 46 authorizes the court to impound the pleadings, to hold the trial in camera and to impound all records in the proceedings. It is possible for this to be effective if the matter is heard by a judge. It is much more difficult for it to be

> effective if it is tried before a jury, and, of course, the rule will not apply if the action is at law. Obviously in trial of cases on claims asserted by seamen because of death, injury, illness, loss of effects, detention, or repatriation, disclosures regarding information and operations of convoys, routes, protection for shipping, etc., might well be made in the course of trial.
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> * * * * *
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> (4) It is further to be noted that these cases will have to be tried largely on depositions. Judges are better qualified by experience than juries to appraise the value of evidence presented in the form of depositions.

That the Congress and the seamen's unions alike thoroughly understood that one purpose of the Clarification Act was to prohibit suit against the Government's agents for negligence of the master and crew, with the consequent jury trial in the state or federal courts, could scarcely be made more plain.

On October 15, 1942, H. Rept. No. 2572, 77th Cong., 2d sess., of the Committee on Merchant Marine and Fisheries, emphasized that while the bill granted government seamen the rights of privately employed seamen, the distinction in the remedy was deliberately made. The report stated at page 14:

> The various rights and remedies under statute and general maritime law with respect to death, injury, illness, and other casualty to seamen, have been rather fully

set forth hereinabove. Under clause 2 of Section 1 (a) these substantive rights would be governed by existing law relating to privately employed seamen. The only modification thereof arises from the remedial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. This procedure is appropriate in view of the fact that the suits will be against the Government of the United States. In such a suit no provision is made for a jury trial as may otherwise be had in a proceeding such as one under the Jones Act for reasons set forth in the letter of the Attorney General. * * *

Other claims under clauses 2 and 3, such as claims for maintenance and cure, collection of wages and bonuses, and making of allotments, shall also be enforced under the Suits in Admiralty Act.

In the Senate, S. Rept. 1655, 77th Cong., 2d sess., of the Committee on Commerce (October 22, 1942), similarly recognized the need for thus modifying the seamen's remedies where government seamen were involved. It stated (pp. 3–4):

The substantive rights under statute and general maritime law with respect to death, injury, illness, or other casualty to seamen employed by the War Shipping Administration would under section 1 be controlled by existing law relating to privately employed seamen. The only modification thereof is that the rights shall be enforced in accordance with the provision of the Suits in Admiralty Act. Other claims, such as claims

for maintenance and care, collection of wages and bonuses, and making of allotments, would also be enforced under that act.

Thereafter, the case of *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, was argued in this Court on December 18, 1942, and decided January 18, 1943. It overruled (317 U. S. at 578) the holding of the *Lustgarten* case (*Johnson* v. *Emergency Fleet Corp.*, 280 U. S. 320) that Government agents were immune from liability even for the independent torts of their own employees merely because Government money would be used to indemnify them in the event of recovery, and held instead that their liability should be no different from that of agents of private ship operators. But although the Roosevelt agreement was an operating agency whereby the Government demised its vessels to the agent as owner *pro hac vice* to man and operate with its own masters and crews, the Court was at pains to point out that "Whether a cause of action against respondent has been established is, of course, a different question" (317 U. S. at 585). *Supra*, pp. 26, 40, 110.

That Congress recognized that the *Brady* case did not materially affect the liability of the general agent acting under the GAA 4-4-42 form of husbanding agreement is evident from the fact that no changes were made in Section 1 of the bill and that on February 8, 1943, H. Rept. No. 107, 78th Cong., 1st sess., of the Committee on Merchant Marine and Fisheries, discussing the new bill (H. R. 133), repeated in substantially identical terms the state-

ment of the previous Committee reports as to the modification in seamen's remedies which Section 1 would bring about. Cf. *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, at 730, fn. 37.

These statements in the hearings and committee reports show that the substantive rights of government seamen were intended by Congress to be the same as those of seamen in private employment, but they also specifically describe the remedy conferred as an important modification. The modification, of course, was that the rights were to be enforced in accordance with the Suits in Admiralty Act against the United States, not by suit at law against the Government's agents.

Further evidence of the legislative intent not to confuse the status of government-employed seamen (who were to be confined to suit against the United States) and privately employed seamen (who might also bring suit against their private employers) appears in certain changes in language made prior to final enactment of the bill. In the form in which the bill originally passed the House, October 19, 1942 (88 Cong. Rec. 8384), Section 1 provided that all seamen employed "by or on behalf of the United States through the War Shipping Administration, *or agents or other persons acting for or on behalf of the War Shipping Administration*, shall, with respect to" death, injuries or other claims have the same rights as if privately employed. The presence of the italicized matter was objected to by the shipping companies as creating "doubt and confus-

ion as to the scope and application of the legislation." They explained, "If it is intended to refer only to seamen who are in the employ of the War Shipping Administration, there would appear to be no necessity of referring to agents or other persons acting on its behalf." House Merchant Marine and Fisheries Committee, Hearings on H. R. 7424, 77th Cong., 2d sess., p. 10. By the time of the passage of the bill by the 78th Congress (89 Cong. Rec. 963), the companies' suggestion was adopted and the language revised so as to omit the italicized matter. The change manifests plainly the Congressional intent to eliminate any possible question of the fact that government-employed seamen, and no others, were to be confined to the remedy against the United States.[7]

3. *The Clarification Act in terms requires that suit be brought only under the Suits in Admiralty*

[7] The debates similarly emphasize that Congress contemplated suits would be brought only against the Government. Senator Overton, discussing an amendment to limit the compensation of seamen's attorneys, stated (89 Cong. Rec. 1920): "This is a bill which provides for the institution of action against representatives of the Federal Government, and I thought it was an opportune time, since the Government was directly concerned, to insert such a provision [for limitation of fees]." Although the Senate later receded from the amendment because opposition had developed (89 Cong. Rec. 1919–20), the introduction of the provision, and its passage by the Senate, as an amendment to "a bill which provides for the institution of action against the representatives of the Federal Government," indicates congressional realization that such suits were to be brought only against the United States.

Act.—Turning to the language of the Clarification Act itself, there can be little doubt that the remedy by suit pursuant to the Suits in Admiralty Act is exclusive.[48] The purpose is evident from the distinction made between "rights" and "remedies", and between claims after its enactment which "shall" be enforced under the Suits in Admiralty Act and those prior to its enactment which "may" be so enforced if the seaman so elects.

The first sentence of Section 1 of the Act confers on government seamen "all of the rights, benefits,

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[48] "Officers and members of crews (hereinafter referred to as 'seamen') employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to * * * (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or reparation, or claims arising therefrom * * * have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to * * * seamen on privately owned and operated American vessels. * * * Any claim referred to in clause (2) * * * hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seamen is employed is not a merchant vessel within the meaning of such Act. Any claim, right, or cause of action or or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration."

exemptions, privileges, and liabilities" possessed by private seamen. The omission of the word "remedies" from this grant shows that while Congress intended to give government seamen the substantive rights available to private seamen, it did not intend to accord them the identical remedies, including the remedy by suit at law with trial by jury which could have been had if suit against the general agent had been authorized. That Congress fully realized that the result of this omission of the word "remedies" would be to confine government seamen to the single remedy of suit against the United States in admiralty is evident from the legislative history of the bill. See *supra*, pp. 118–127.

Section 1 further provides that seamen's claims for death, injuries, illness, maintenance and cure "shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act." The language is explicit and mandatory. Since only the United States is suable under the Suits in Admiralty Act, the use of the word "shall," the language of command, rather than "may," excludes any construction under which suit against an agent of the United States might otherwise be held justified. *Escoe* v. *Zerbst*, 295 U. S. 490, 493. The mandatory character of the word "shall" is confirmed by the contrasting use of the word "may" in the succeeding sentence. In the *Hust* case, this Court held that the latter sentence, which uses the word "may" with reference to injuries incurred by seamen between October

1, 1941, and the effective date of the Clarification Act, authorizes the seaman to proceed either against the United States under the Suits in Admiralty Act or against the general agent under the Jones Act (*Hust* v. *Moore-McCormack Lines*, 328 U. S. at 728). Where the word "shall" is used, as here—immediately before the "election" provision providing what "may" be done in respect of injuries incurred on and after the date of the Act—a contrary result to that in the *Hust* case follows. The Oregon Supreme Court in *Fink* v. *Shepard S. S. Co.* (No. 360, this Term) and the Court of Appeals for the Third Circuit, in *Gaynor* v. *Agwilines* (No. 430, this Term), have so held.[49] Their decisions accord with the well-settled rule that use of the words "may" and "shall" in such close juxtaposition in the same section of a statute implies that each is used in its ordinary sense and not in the sense of the other. *Ballou* v. *Kemp*, 92 F. 2d 556, 560 (C. A. D. C.); *Federal Land Bank of Springfield* v. *Hansen*, 113 F. 2d 82, 84 (C. A. 2).[50]

Further confirmation of the exclusive character of the remedy, pursuant to the Suits in Admiralty

[49] The Court of Appeals for the Ninth Circuit, without discussion, likewise ruled that the United States alone, and not the general agent, is exclusively responsible for a seaman's post-Clarification Act injury. *United States* v. *Lubinski*, 153 F. 2d 1013. The court below is thus alone in the minority.

[50] *Jensen* v. *Lehigh Valley R. Co.*, 255 Fed. 795, 796 (S. D. N. Y.); *Murray* v. *Edes Mfg. Co.*, 305 Mass. 311, 315; *State ex Inf. McKittrick* v. *Wymore*, 343 Mo. 98, 109; *Smith* v. *School District*, 241 Mich. 366, 369; *State ex rel. Wendling Bros. Co.* v. *Board of Education*, 127 Ohio St. 336, 338.

Act, is found in the provision of Section 1 of the Clarification Act conditioning the right to sue under that Act upon the claim being thereto.ore "administratively disallowed." The quoted term is defined by the statute to mean "a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration." The "administrative disallowance" requirement, which makes expressly applicable the fundamental doctrine of exhaustion of administrative remedies, shows that Congress was thinking in terms of a requirement that suits would be brought only against the United States. To allow an alternative remedy by a suit against the general agent would nullify this statutory requirement of prior administrative consideration. Although agents are not mentioned in the Act, as passed, the legislative history of their omission (*supra,* pp. 126–127) clearly excludes the notion that they were regarded by Congress as employers of the Government's seamen or liable to alternate suit as such. Had Congress so regarded them, the Clarification Act would have been unnecessary since the seamen, without additional legislation, would have had full rights to sue and recover from the agents under the Jones Act, with the privilege of jury trial. *Gaynor* v. *Agwilines, Inc.,* 76 F. Supp. 617, 620 (E. D. Pa.), affirmed, 169 F. 2d 612 (C. A. 3), pending on writ of certiorari, No. 430. In the language of the *Fink* case (No. 360) "It would have been wholly unnecessary to accord to seamen in

rivate employment" the rights of seamen in rivate employment" (193 P. 2d at 268).

Finally, the election provision of Section 1 of the Act, respecting claims arising after October 1, 1941, but prior to the date of enactment [March 24, 1943] provides ultimate confirmation of the exclusive character of the remedy by suit against the United States. This retroactive election provision was construed by this Court in the *Hust* case to give government seamen the right to proceed against either the United States or an operating agent for the Government, with regard to claims arising in the designated period. It was pointed out that the need for the elective, alternative remedy on claims antedating the Act may have arisen out of the "uncertainties and complexities" which might otherwise work to the seamen's prejudice in electing his appropriate remedy. 328 U. S. at 720–722. It was recognized that different considerations might apply in the post-Clarification Act period. 328 U. S. at 727, 728, 733.

In the case of claims arising after March 24, 1943, and long after the uncertainties of the change-over from private to government operation were ended, *supra*, pp. 115–118, there can be no such uncertainty. The Act specifically defined the remedies as well as the rights thenceforward available to government seamen. It put them on notice that the United States was assuming full and exclusive responsibility for the torts of its maritime employees, and directed the seamen to sue the United States under

the Suits in Admiralty Act for such torts. Since the bills which became the Act had been considered by Congress during both the 1942 and 1943 sessions, and since representatives of the seamen's unions with which the United States had signed the overall collective bargaining arrangement, participated in the congressional hearings on the bill, the enactment of this rule did not take the seamen and their representatives by surprise, and they were fully aware of the exclusive character of the remedy in cases arising out of post-Clarification Act injuries.

We submit that it is thus plain that the clearly expressed intent of Congress, when it gave government seamen the rights of privately employed seamen, was to restrict the enforcement of the rights thus given to suit against the United States in admiralty. The rights were to be measured by those of seamen in private employment rather than by those of other employees in government service, but since the seamen involved were employees in the civil service of the United States and not employees of private shipping companies, the rights thus given were necessarily to be enforced solely against their employer, the United States.

To fail to recognize this exclusive character of the remedy by suit against the United States under the Suits in Admiralty Act, would be to defeat the considered intention of Congress that for reasons of national security the civil-service seamen on government-operated vessels should enforce their

rights solely in admiralty, where no jury is present and trials can be held *in camera* and the records of the proceedings can be impounded so as to prevent disclosure to the enemy of information detrimental to the national safety and to the lives and safety of the seamen themselves. See *Fink* v. *Shepard S. S. Co.*, 192 P. 2d at 268–269.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the exclusive remedy of government seamen, such as respondent, is by suit against the United States, the operating owner of his ship, and not against petitioner, an agent appointed by the United States solely to operate the accounting and certain other parts of the shoreside business of the vessel, and accordingly that the judgment below should be reversed.

PHILIP B. PERLMAN,
Solicitor General.
H. GRAHAM MORISON,
Assistant Attorney General.
LEAVENWORTH COLBY,
PAUL A. SWEENEY,
MORTON HOLLANDER,
Attorneys.

JANUARY 1949.

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

1. The War Shipping Administration (Clarification) Act of March 24, 1943, c. 26, § 1, 57 Stat. 45 (50 U. S. C. App. 1291), provides in pertinent part:

> (a) Officers and members of crews (hereinafter referred to as "seamen") employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, as amended by subsection (b) (2) and (3) of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. Such seamen, because of the temporary wartime character of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act, as amended; the Civil Service Retirement Act, as amended; the Act of Congress approved March 7, 1942 (Public Law 490, Seventy-seventh Congress); or the Act entitled "An Act to provide benefits for the

injury, disability, death, or detention of employees of contractors with the United States and certain other persons or reimbursement therefor", approved December 2, 1942 (Public Law 784, Seventy-seventh Congress). Claims arising under clause (1) hereof shall be enforced in the same manner as such claims would be enforced if the seaman were employed on a privately owned and operated American vessel. Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. Any claim, right, or cause of action of or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration. Rights of any seaman under the Social Security Act, as amended by subsection (b) (2) and (3), and claims therefor shall be governed solely by the provisions of such Act, so amended. When used in this subsection the term "administratively disallowed" means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration. When used in this subsection the terms "War Shipping Administration" and "Administrator, War Shipping Adminis-

tration" shall be deemed to include the United States Maritime Commission with respect to the period beginning October 1, 1941, and ending February 11, 1942, and the term "seaman" shall be deemed to include any seaman employed as an employee of the United States through the War Shipping Administration on vessels made available to or subchartered to other agencies or departments of the United States.

2. The Jones Act of June 5, 1920, c. 250, § 33, 41 Stat. 1007 (46 U. S. C. 688), provides in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *

3. The Federal Employers' Liability Act of April 22, 1908, c. 149, § 1, 35 Stat. 65 (45 U. S. C. 51), as amended, provides in pertinent part:

> every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its * * * boats, wharves, or other equipment.

4. Revised Statute 1753 (5 U. S. C. 631), authorizing the President to prescribe regulations regarding civil service employment, provides:

The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service.

5. The Civil Service Rules and Schedules, as codified in Title 5, Code of Federal Regulations, p. 48 and 1943 Cum. Supp. pp. 1441, 1488 provide in pertinent part as follows:

CIVIL SERVICE RULE II

SECTION 2.1. *Extent of the classified service.*—The classified service shall include all persons who have been heretofore or may hereafter be given a competitive status in the classified civil service with or without competitive examination, by legislative enactment, or under the civil-service rules promulgated by the President, or by Executive orders covering groups of employees with their positions into the competitive classified service or authorizing the appointment of individuals to positions within such service. It shall include all positions now existing or hereafter created by legislative or Executive action, of whatever function or designation, whether compensated by a fixed salary or otherwise, unless excepted from classification by specific affirmative legislative or Executive action. No right of classification shall accrue to per-

sons whose appointment or assignment to classified duties is in violation of the civil-service rules. [E. O. 7915, June 24, 1938, effective Feb. 1, 1939; 3 L. R. 1519.]

* * * * * *

SECTION 2.3. *Exceptions from classification.*—(a) Positions in Parts 50 and 51 are excepted from the classified service.

(b) Appointments to the excepted positions named in Part 50 may be made without examination or upon noncompetitive examination. * * * [E. O. 7915, June 24, 1938, effective Feb. 1, 1939, as amended by E. O. 8083, Apr. 10, 1939, effective May 1, 1939; 3 F. R. 1519, 4 F. R. 1577.]

* * * * * *

SECTION 50.0. *Certain positions excepted from examination under § 2.3.*—The positions designated in this part are excepted from examination, but not more than one position shall be treated as excepted under any title unless a different number of positions be indicated (Rule XVI, sec. 1, E. O. 209, Mar. 20, 1903, 5 C. F. R. 16.1) [Regs. CSC, as of June 1, 1938].

* * * * * *

SECTION 50.21. *United States Maritime Commission.*—(a) All positions on Government-owned ships operated by the United States Maritime Commission [E. O. 9004, Dec. 30, 1941; 7 F. R. 2].

NOTE: These positions were transferred to the War Shipping Administration by E. O. 9054; 7 F. R. 837.

6. War Shipping Administration Operations Regulation No. 12, Supplement 1, provides as follows:

OPERATIONS REGULATION NO. 12

Supplement No. 1, October 7, 1944

Pertaining to All Vessels Owned by or Under Charter to the War Shipping Administration (Dry Cargo and Passenger Vessels, Tankers, Colliers, and Small Craft)

Subject: Employee Status of Certain Personnel Employed by Agents

This Supplement No. 1 to Operations Regulation No. 12 is issued for the purpose of clarifying the employment status of certain personnel employed by Agents in the conduct of the business of vessels or their cargo under the GAA, TCA, and BA agreements.

It is clear from the provisions of Article 3A (d) of the General Agency Service Agreement that Master and crew members are employees of the United States but, no specific provision is made in the GAA, TCA, or BA agreements as to whether other personnel are employees of the United States or of the Agents, General Agents, or Berth Agents. Reading the provisions of the agreements as a whole it is also clear that, except for the Master, officers, and crew, persons employed by an Agent, General Agent, or Berth Agent are employees of such Agents and not of the United States.

1. Excepting only additions to the vessel's crew and employees of independent contractors, personnel employed by General Agents pursuant to Operations Regulation No. 12 are employees of the General Agent and not of the United States. Other personnel directly employed by Agents, General Agents, and Berth Agents, (and their Sub-Agents) to perform work in connection with vessels or their cargo and special work incident thereto, including shore gangs, checkers,

tallymen, watchmen, guards, coal trimmers, and other extra labor, but excluding relief officers, shore relief, and crew members, are employees of such Agents and not of the United States.

2. The direct labor costs of the employees of Agents referred to in paragraph 1 shall be paid for from the corporate funds of the Agents, and, in accordance with Article 7 of the service agreements, the Agent may reimburse himself for such expenses from the special bank account established for use in connection with the service agreements. Such costs shall include, but without limitation, taxes (employer's contributions only) payable pursuant to the Federal Insurance Contributions Act (OAB tax) and to any state or federal unemployment insurance law in respect of the direct labor to which the same may be applicable; and premiums on workmen's compensation insurance carried pursuant to the Federal Longshoreman's and Harbor Workmen's Compensation Act and any state workmen's compensation laws in respect of the direct labor to which the same may be applicable. Such costs shall not include compensation for supervisory services or overhead of the Agent.

3. With respect to the work performed by the employees of Agents referred to in paragraph 1, the Agent shall be indemnified to the full extent provided under the applicable service agreement, regardless of the fact that the employees in question are employees of the Agent and not of the United States.

4. The interpretation and instructions contained in this Regulation need not be applied retroactively by the Agents.

(Sgd.) G. H. HELMBOLD,
Assistant Deputy Administrator for Ship Operations.

APPENDIX B

THE LETTER OF THE GENERAL COUNSEL, UNITED STATES MARITIME COMMISSION, IN REPLY TO THE ENQUIRIES OF THE COURT IN CALDAROLA *v.* ECKERT, 332 U. S. 155

UNITED STATES MARITIME COMMISSION,
Washington, April 28, 1947.

Honorable JOHN F. SONNETT,
Assistant Attorney General,
Department of Justice,
Washington 25, D. C.

SIR: This has reference to the request of your Department in connection with the case of *Caldarola* v. *Moore-McCormack Lines, Inc., et al.*, that the Maritime Commission as successor to the United States Shipping Board and the War Shipping Administration, supply additional information for the use of the Supreme Court. It appears that you desire to be informed why the War Shipping Administration, instead of entering into managing-operator agreements, such as had been used by the Shipping Board and the Maritime Commission from the close of wartime government operation in 1920 until the final sale of the Government's merchant fleet in 1940, decided to adopt service agreements whereby it employed existing steamship companies as its agents to conduct the business of the vessels. You also request an explanation of the differences between the standard form service agreement GAA 4-4-42 adopted by the War Shipping Administration and the former

managing-operator agreements, together with a statement as to the manner in which the vessels were operated and serviced under the various integrated contracts of the War Shipping Administration.

CONGRESS AUTHORIZED DIRECT GOVERNMENT OPERATION

It must be understood at the outset that direct government operation of the government merchant fleet was believed indispensable to the war effort in both World Wars. It was accordingly specifically authorized by the Congress and the arrangements which were made for direct government operation with the assistance of experienced steamship companies as ships' husbands for the servicing of the vessels and as berth agents for the handling of port services arising out of their operations on the various routes were deliberately chosen from that point of view. As is evident from a comparison of the new standard form agreements, this type of operation constituted a significant change from the method of operating government vessels which had been in force from January 1920 until the sale of the last of the government lines in May 1940 and marked a return to the direct government operation of World War I.

The effect of the old peacetime operation, particularly subsequent to 1929, is best summarized by the Shipping Board in its Annual Report for 1929. There, in explaining the purpose of the operating agreement which it had adopted, the Board stated (p. 95):

> By this plan, the operator assumes complete physical and financial control of the operations of the line, and the Merchant

> Fleet Corporation confines its activities to periodic inspections covering the maintenance of service in accordance with the contract and the physical condition of the ships. For the services of the operator in maintaining the line, a lump sum amount is paid, the amount to be determined for each line by analysis of recent operating results. This form of agreement places the managing operator upon as nearly a privately owned operating basis as is practical and should pave the way for the eventual sale of the lines.

This referred to what was ultimately known as the "Lump Sum Operating Agreement, 1930" which was considered in the reports of the Black Committee (S. Rep. 898, 74th Cong., 1st Sess.) and the Comptroller General (H. Doc. 217, 72d Cong., 1st Sess.). Its text is printed in full in Smith and Betters, *U. S. Shipping Board, its history, activities, and organization*, pp. 293–302. Earlier forms are printed in S. Doc 38, 67th Cong., 1st Sess., pp. 60–65.

The normal peacetime scheme of operation which, following the Black report, Congress directed in the Merchant Marine Act, 1936, required the Commission to arrange for the charter of the government-owned merchant fleet by private steamship companies. Section 704 (46 U. S. C. 1194) provided:

> All vessels transferred to or otherwise acquired by the Commission in any manner may be chartered or sold by the Commission pursuant to the further provisions of this Act. All vessels transferred to the Commission by this Act and now being operated by private operators on lines in foreign com-

> merce of the United States shall be temporarily operated by the Commission for its account by private operators until such time and upon such operating agreements as the Commission may deem advantageous, but the Commission shall arrange as soon as practicable to offer all such lines of vessels for charter as hereinafter provided; preference to be given to present operators, and all operations of the Commission's operation by private operators shall be under such operating agreements discontinued within one year after the passage of this Act.

But in order to assure operation of lines which the Commission might deem essential, but for which it might be impossible to find private operators willing to assume the financial risk of operation under bareboat charter, Congress provided in Section 707, as amended (46 U. S. C. 1197), that the Commission itself might operate such lines through private operators under such operating agreements as the Commission might find advantageous. It was under exceptional arrangements of this character that the special operating agreements with the Roosevelt, Southgate-Nelson and two other operating companies were continued by the Commission until final sale of the government lines in 1940. And it was these special agreements which were involved in the cases of *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, and *Quinn* v. *Southgate-Nelson Co.*, 121 F. 2d 190, cert. den. 314 U. S. 682. The text of the special Roosevelt agreement is printed in full in the Brady record October Term 1942, No. 269, pp. 21–32.

In order to meet potential war conditions, Congress, by the Act of August 7, 1939, c. 555, 53 Stat.

1255 (46 U .S. C. 1242 (e)), amended the Merchant Marine Act and conferred special powers upon the Commission with respect to vessels requisitioned or purchased in case of national emergency. In particular Congress authorized the Commission "to repair, recondition, reconstruct, *and operate*, or charter for operation, any vessels acquired" under such authority. By Section 4 of the Act of June 6, 1941, c. 174, 55 Stat. 244 (50 Appx. U. S. C. 1274), Congress further recognized the developing national emergency and expressly directed that any vessels acquired or made available to the Commission might be "operated by the Commission upon such terms and conditions as it may deem desirable and in the public interest, giving primary consideration to the needs of national defense." Finally, following the outbreak of hostilities, President Roosevelt by Executive Order 9054 of February 7, 1942 (3 C. F. R. 1943 Cum. Supp. 1086), issued pursuant to the First War Powers Act of December 18, 1941, c. 593, 55 Stat. 838 (50 Appx. U. S. C. 601), established the War Shipping Administration under the direction of an Administrator. Paragraph 2 of that order directed the Administrator to control the "operation, purchase, charter, requisition, and use of all ocean vessels under the flag or control of the United States" with the exception of vessels under the control of the military or naval authorities. By paragraph 3 it also transferred to the Administrator all duties and authority with respect to the operation of vessels which had previously been conferred by law upon the Maritime Commission.

The mandate for wartime operation thus granted the War Shipping Administration was entirely different from the peacetime functions of the Shipping Board and the Maritime Commission as directed by earlier legislation culminating in the Merchant Marine Act, 1936, and carried out by means of the operating agreement employed from 1920 to 1940. On the contrary, the type of operation authorized was analogous to the direct government operation followed during World War I by the Shipping Control Committee of the Shipping Board with the aid of the Division of Operations of the Fleet Corporation. Then President Wilson, by Executive Order 2664 of July 11, 1917, issued pursuant to the emergency provisions of the Act of June 15, 1917, c. 29, 40 Stat. 182, had conferred similar authority upon the Shipping Board to assume "the operation, management and disposition" of all vessels acquired by the United States. The Board, in its turn, by resolution of February 11, 1918 (H. Rept. 1399, 66th Cong., 3d Sess., p. 32), had created the Shipping Control Committee "empowered to manage, control, distribute and allocate all tonnage now subject or which hereafter may become subject to the control of the United States Shipping Board by ownership, charter or otherwise." And the direct governmental wartime operation that followed is now history (see Crowell and Wilson, *Road to* France, pp. 377–378; Smith and Betters, *U. S. Shipping Board, its history, activities and organizations*, pp. 24–25, 29–30).

It should be common knowledge that the basic reason for the War Shipping Administration following a plan of operations whereby it manned and

navigated the Government's vessels was the conviction that it was essential to the conduct of the war to make the navigation and physical management of the vessels afloat an exclusively government operation. But equally it was desirable to take advantage of the existing contracts and experienced personnel of steamship companies for servicing the shoreside needs and administrative affairs of the vessels and obtain the benefit of their existing agreements with the maritime unions for procuring masters and crews. From a review of the War Shipping Administration files it would seem that the following points were deemed particularly essential:

1. Insure immunity from foreign and local inspection, regulation, and taxation for the vessels and their operation.

2. Retain direct control of the routing, navigation and physical management of the vessels and of their masters and crews but not necessarily of their procurement for employment.

3. Provide a mechanism for direct control of fueling, supplying, repairing and similar services and for immunity from foreign and local regulation and taxation of such activities.

These points could be best attained only by direct government operation. Operation of the vessels by independent contractors would not fulfill the requirements.

When War Shipping Administration assumed this task of operating the Government's merchant fleet, the then existing scheme of the government was to bareboat charter vessels to private operators. The onset of war led to a general program of requisition and to acquisition of a vast number of vessels of all types through purchases and the stepping

up of our construction program. The problem presented under these new conditions was how to carry out the mandate granted by Executive Order 9054 "to control the operation * * * and use of all ocean vessels" as a coordinated major governmental program while at the same time taking advantage of the existing organizations in the various ports which the steamship lines had created. Efficient wartime operation required speed and secrecy. It was indispensable to escape the detailed inspections, reports and accounting which foreign, and to some extent local, governments impose on private vessel operation in aid of their police, regulation and taxation powers. Only direct government operation would support the claim of sovereign immunity and permit escape from such delays and publicity. But efficient operation just as obviously dictated a policy of full utilization of the technical skill and facilities of shipping organizations, which had been painstakingly encouraged by the Commission's aid over a long period of years, precisely in order that they might be utilized by the public in just this type of emergency. Such organizations, developed in peacetime by private shipping companies, consist of highly skilled personnel trained to work smoothly and closely together. Their technical personnel have complete familiarity with the terminals, connecting carriers, loading and unloading conditions, as affected by port, sea and weather conditions, and with all other problems inherent in overseas transport in the various trades. They are familiar as a team with the various techniques and skills of such shoreside matters as towage, wharfage and stevedoring practices, maintenance and voyage repairs and countless other minor port operating details

which, unless efficiently handled, result in substantial loss of time, money and ship-space. Such organizations also have access to a supply of ship and shore personnel as a result of their union agreements and other connections. It was obvious that the only workable solution was a twofold division of duties; the navigation and physical management of the vessels afloat was to be carried out by ship masters acting directly as agents or employees of the United States and in exclusive control of their vessels and crew; the port services, the husbanding of the vessels and the details of shore side administration were to be carried out by existing shipping companies acting not as independent contractors but solely as agents for the United States.

The nature of such agency arrangements was especially important in connection with foreign taxation and regulation. For example, not even an act of Congress might have been sufficient to preserve immunity of the vessels if the general agents were made independent contractors and placed in possession of the vessels. Cf. *Mexico* v. *Hoffman*, 324 U. S. 30, 37. As Admiral Land stated in a circular instruction of June 10, 1942, addressed to all agents and general agents with respect to tax immunity:

> When the forms of Service Agreements (GAA and TCA) were drafted, and later when they were approved by me for use as standard forms, it was contemplated that Agents and General Agents who executed them would act as agents for the United States, and not as independent contractors, in conducting the business of the vessels allocated to them (see Articles 1 and 2). It was also contemplated that, since the agents were

authorized to make purchases necessary to the maintenance, management, and operation or conduct of the business of the vessels, the purchases would be made in the name of the United States as principal, that title to the goods purchased would vest in the United States, and that the United States, and not the Agent, would be obligated to pay the purchase price and its credit would be pledged therefor.

See also previous circular instructions, dated May 19, 1942, by the Director of Fiscal Affairs.

Of all the various aspects covered by the discussions that attended the drafting of the service agreements necessary to carry out the plan for wartime operations, the question of whether the crews were to be employees of the United States or of the general agent received most particular attention. Aside from the propriety of a Government agency, as employer, negotiating directly with labor unions or entering into collective bargaining agreements, the practical difficulties of so doing were almost insuperable due to the large number of labor organizations and the consequent variations as to wages, working conditions, and other matters which existed in the maritime industry as a result of a long history under private operation. It was recognized that, for at least the early years of the war, the requisitioned vessels would represent a vast majority of those under government control and the transition from private to direct government operation could be best achieved only by arrangements which provided for a minimum disturbance of existing collective bargaining relationships. On the other hand, there was no doubt that as the general agents would not be owners nor bareboat charterers

of the vessels they could not claim the benefit of the limitation of liability acts (46 U. S. C. 181 *et seq.*) as the law then stood. Compare Section 4 of the War Shipping Administration (Clarification) Act (50 Appx. U. S. C. 1924), extending the benefits of the acts. General agents, while willing to assist in procurement, were reluctant to accept the unlimited liability which would result from the masters and crews being their agents or employees. Moreover it was believed that crews would have greater sense of responsibility and would be more likely to refrain from strikes and other work stoppages if they were employees of the United States. Finally, only if the masters and crews were government employees could the United States be certain of its right to invoke sovereign immunity abroad and to insist at home that all litigation involving the navigation and management of the vessel should be in the admiralty courts where necessary wartime secrecy could be preserved.

Ultimately a plan was developed similar to that stated in Section 79, comment a, of the Restatement of Agency. It was determined that the general agent, acting as agent for the Government, should procure masters and crews to man the vessels. It was to be expressly provided that they should be procured pursuant to the applicable union agreements and in accordance with customary commercial practices. It would thus be possible to retain the advantage of existing union agreements without sacrificing the advantages arising out of the status of the masters and crews as government employees subject to the exclusive control of the United States.

Pursuant to the plan thus evolved, the War Shipping Administrator adopted forms of service agreements whereby existing steamship companies were appointed general agents to husband vessels to be assigned to them and operators of existing steamship lines were appointed berth agents to handle the cargo activities and other port services required by vessels assigned to the routes established. These service agreements were promulgated by the Administrator in General Order No. 21 of September 22, 1942 (7 Fed. Reg. 7561), and its supplements. An examination of the texts of the two agreements and a consideration of the complementary functions which they assign to the general agent and berth agent in attending to the service of the vessel on shore shows conclusively that neither agent is in control of the vessel but that the United States alone, as the principal both of the vessel's master and of the general agent and berth agent has full control.

The general agency agreement, form GAA, 4–4–42, in effect at the time Caldarola was injured (printed in Document 4, Plaintiff's Exhibit 7, pp. 326–336), provided in pertinent part as follows:

> ARTICLE 1. The United States appoints the General Agent *as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned* to it by the United States from time to time.
>
> ARTICLE 2. The General Agent accepts the appointment and undertakes and promises so *to manage and conduct the business for the United States,* in accordance with such directions, orders, or regulations as *the latter has prescribed,* or from time to time *may prescribe.* * * *

ARTICLE 3A. To the best of its ability, the General Agent shall *for the account of the United States*:

(a) Maintain the vessels in such trade or service *as the United States may direct*;

(b) Collect all moneys due the United States * * * and account to the United States for all moneys collected or disbursed * * *;

(c) Equip, victual, supply and maintain the vessels, subject to such directions, orders * * * and inspection *as the United States may from time to time prescribe*;

(d) * * * The Master *shall be an agent and employee of the United States and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel.* The General Agent shall procure and *make available to the Master for engagement by him* the officers and men required by him to fill the complement of the vessel * * * *The officers and members of the crew shall be subject only to the orders of the Master.* All such persons shall be paid in the customary manner with *funds provided by the United States hereunder.*

It was complemented by the berth agency agreement, form BA 12–29–43, in effect at the time Caldarola was injured (*ibid.*, pp. 367–374), which provided in pertinent part as follows:

ARTICLE 1. The United States appoints the Berth Agent *as its agent and not as an independent contractor, to conduct the business of vessels* assigned to it by the United States from time to time.

ARTICLE 2. The Berth Agent accepts the appointment and undertakes and promises so *to conduct the business for the United States,* in accordance with such directions,

orders or regulations *as the United States has prescribed*, or from time to time may prescribe. * * *

ARTICLE 3A. Unless otherwise directed by the United States, the Berth Agent, in all cases, shall, to the best of its ability, for the account of the United States:

(a) Perform all of the customary duties of an agent in conducting the business of the vessels subject to this Agreement, subject to the orders of the United States *as to voyages, cargoes, priorities of cargoes, charters, rates of freight and other charges and as to all matters connected with the use of the vessels;* * * *

(b) Collect all moneys due the United States under this Agreement and deposit, remit, or disburse the same in accordance with such regulations as the United States may prescribe from time to time, and account to the United States * * *

(c) *Provide and pay for all fuel, fresh water, stevedoring and other cargo handling expense, port charges, wharfage and dockage, pilotages, agencies, canal dues, commissions, and consular charges,* except those pertaining to the Master, officers and crew, * * * Provided, That, where the United States has entered into agreements for any of the foregoing items (such as for stevedoring and supplying fuel), the Berth Agent shall see that the items are furnished pursuant to the provisions of such agreements and shall make the necessary arrangements with the District Manager, or other representative of the United States therefor.

(d) *Issue or cause to be issued to shippers customary freight contracts and bills of lading in the form prescribed by the United States,* and prepare manifests and other documents. Where appropriate, issue or

cause to be issued to passengers customary passenger tickets in the form prescribed by the United States.

In view of the fact that as to some of the vessels the same person might act both as general agent and as berth agent and the fact that vessels at times would be in ports where it would be necessary for the berth agent to perform the duties of husbanding the vessel, a certain overlapping of duties and powers was necessarily provided for. However, none of these powers infringed upon the absolute control of the United States through the master over the navigation and physical management of the vessel. No conflicts could arise from this overlapping of duties between the general agent and the berth agent because they were avoided or resolved in practice by specific orders of their common principal, the United States. The clear line of authority vested in the master from the United States as contrasted with the overlapping duties of general agents and berth agents, indicates clearly that the master was directly responsible to the United States and not to the general agent or berth agent.

DIFFERENCE FROM COST-PLUS CONTRACTOR AGREEMENT

Analysis of the differences between the general agency agreement, on the one hand, and the agreements which turned the vessels over to private contractors for operation, on the other, confirms that the control of the navigation and physical management of the Government's vessels, as distinct from services in attending to their business on shore, was in the United States and that the general agent no more than the berth agent was permitted to have

any control over the navigation and physical management of the vessels. As typical of the latter group of contracts we may take that with the Roosevelt Steamship Company, which was before the court in the *Brady* case, and the "Lump Sum Operating Agreement, 1930," which was before the Black Committee in 1935. As indicated above, the texts of both are readily available to the Court.

Article 1 of the general agency agreement expressly states that the Government appoints the general agent "as its agent and not as an independent contractor," to "manage and conduct the business of the vessel." On the contrary, paragraph 1 of the Special Roosevelt agreement provides that the "managing agent" is appointed "to manage, *operate*, and conduct the business of the line"; and paragraph 3 states that the vessels are allocated "for management and *operation*." The 1930 agreement employed a similar form and in addition in paragraph 14 provides that the "managing operator" shall "assume control" of "the management and operation of the vessels." Significantly, such provisions are carefully excluded from the general agency agreement.

Article 3A (a) of the general agreement provides that the general agent shall maintain the vessels in such trade as the United States may direct. The Government is thus entirely free to issue and did issue detailed orders concerning routes, voyages, cargoes, rates of freight and all similar matters. The special Roosevelt agreement, on the other hand, within the limitations of paragraphs 4 and 5, concerning the number of sailings on the precise trade routes specified and the necessity for contracting in the trade name of the line, leaves the entire

operation to the contractor's discretion. Paragraph 5 of the 1930 agreement is similar in effect. Both leave the times and conditions of the sailings entirely to the discretion of the operator.

Article 3A (c) of the general agency agreement requires the general agent to "equip, victual, supply and maintain the vessels" as directed by the United States, and 3A (d) requires the general agent to procure the master and crew. But it is provided that, once procured, the master "shall be an *agent and employee of the United States* and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel" and that "the officers and members of the crew shall be subject only to the orders of the master." Finally it directs that they shall be paid with funds provided by the United States. No corresponding language exists in the old agreements. Paragraph 7 of the Roosevelt agreement requires the managing agent to "*man,* equip, victual, supply and *operate* the vessels." Paragraph 8 of the 1930 agreement provides, "The Managing Operator shall, *at his own expense, man, operate,* victual, *navigate,* fuel, and supply the vessels, and shall pay all port charges, pilotage, taxes, and all other costs and expenses." The only restriction upon the operator in the old forms is that the licensed officers and chief steward are to be subject to the Government's approval.

Article 8 of the general agency agreement states that the United States will provide insurance against all insurable risks including marine, war and protection and indemnity risks, "which insurance shall include the general agent and the vessel personnel as assureds." Paragraph 14 of the spe-

cial Roosevelt agreement and paragraph 20 of the 1930 agreement, on the other hand, required the Government to provide all marine insurance, but required the operator to provide all protection and indemnity and similar form of insurance which the Government may deem necessary. Protection and indemnity insurance covers the vessel's liability for personal injury to crew members and others and for damage to cargo. The function of providing it is ordinarily placed upon the party responsible for the navigation and management of the vessel. The retention in the United States, by the general agency agreement, of the function of providing protection and indemnity insurance is significant as showing that the navigation and physical management of the vessel is completely divorced from the functions of the general agent in husbanding the vessel and attending to its shoreside activities.

Article 1 of the general agency agreement provides that, unless otherwise instructed and "subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States," the general agent shall "arrange for the repair of the vessels" and cooperate with representatives of the United States in making any inspections or investigations that the United States may deem desirable. Article 3A (c) imposes a general duty of maintenance. Paragraph 11 of the special Roosevelt agreement similarly requires the managing agent to "exercise reasonable care and diligence to maintain the vessel." But paragraph 12 of the Roosevelt agreement further provides that the Government shall have the right "to survey any of the vessels op-

erated by the managing agent hereunder to satisfy itself that they are being properly maintained" and requires the managing agent "to give such representatives as the owner may designate from time to time full, free and complete access at all reasonable times to all parts of the vessels." Paragraph 9 of the 1930 agreement provides that "The Managing Operator shall, at its own expense * * * keep said vessels * * * in substantially the same condition as when delivered," and paragraph 5 reserves the right for the Government to survey the vessels at any time. Such provisions for access to the vessels, although essential in the earlier agreements when the United States was not in possession of the vessels, were obviously unnecessary in the 1942 general agency agreement since the master "as agent and employee of the United States," exercising full control "with respect to the navigation and management of the vessel," would hold possession of the vessel for the United States and subject to its access at all times.

The financial arrangements for the vessels also tend to confirm that under the general agency agreement the vessels are in the exclusive control of the Government. The Lump Sum Operating Agreement, 1930, provides that the managing operator shall pay all expenses of operation and in paragraph 18 states that he "agrees to assume for his own account all losses incurred in the operation" and that any profits shall be his property. The Operator's compensation is fixed by paragraph 21 at a lump sum for each voyage. The Roosevelt agreement, on the other hand, provides in paragraphs 6, 7 and 19 for an ordinary cost-plus-fixed-fee type of operation. Article 7 of the general agency agreement,

by contrast, not only requires the United States to reimburse the general agent "for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder," but, moreover, provides that the United States may advance moneys "to provide for disbursements hereunder in accordance with such regulations" as it shall prescribe. In fact, in accordance with the practice codified in Fiscal Regulation No. 6 (Revised), January 1, 1944, all expenses are paid directly from funds of the United States placed in special deposit accounts provided for in the forms found at pp. 386–394 of Document 4 (Plaintiff's Exhibit 7). As compensation, Article 5 of the general agency agreement allows "such fair and reasonable amount" as the Administrator shall from time to time determine. At the time Caldarola was injured compensation was fixed by War Shipping Administration General Order No. 34, December 31, 1943 (9 Fed. Reg. 1059). The basic amount totaled $80 per day per vessel for husbanding and accounting services. General agents and berth agents performing berth or port services are also compensated by certain amounts measured by the cargo and passengers loaded or unloaded. All compensation is subject to recapture or renegotiation to the extent found to be excessive. Under both the Roosevelt agreement and the general agency agreement the losses and profits of the operators fall upon the United States. The general agency agreement, however, differs in that the agent is no longer, as in the old forms, an independent contractor, "managing agent" or "managing operator." The general agent is re-

stricted to being a ship's husband acting merely as an agent and under detailed government control.

OPERATION UNDER THE 1942 AGREEMENTS

It is obvious from the foregoing analysis that general agents and berth agents in the operation of War Shipping Administration vessels are mere agents limited to the performance of shore side or nonnavigating functions under general supervision and are not allowed the board discretion exercised by independent contractors in control or possession of the vessels. The general agency and berth agency agreements alike made every action of agents subject to "such directions, orders or regulations" as the Government should prescribe. And in fact the various activities of the agents were subjected to control through the medium of general orders, operations regulations, traffic regulations, fiscal regulations, legal bulletins, auditing and accounting instructions, insurance instructions and medical directives and through supervision by the War Shipping Administration with the aid of some 5,000 employees located in the principal ports, as well as at Washington. The discretion of agents is particularly circumscribed by three practices followed by the War Shipping Administration in operating the Government's merchant fleet: (1) The appointment of both general agents to render husbanding services and berth agents to render port services to the vessels, (2) the Government's execution of master contracts for the principal services and supplies needed for the vessels, and (3) the requirement of Article 3A (d) that the master be an agent of the United States and not of the general agent and the crew subject only to the orders of the master. Such

practices are, of course, entirely foreign to operation by independent contractors; as well as to private peacetime operation, for in those the independent contractor or private operator enjoys unlimited discretion in the sources and methods of services and supply.

The restrictions resulting from the combined use of berth agents and general agents are many and War Shipping Administration operations bear little resemblance to peacetime operations. Succinctly stated just as general agents are charged with the function of arranging for maintaining and supplying the vessels for the account of the United States, so berth agents are charged with the correlative function of arranging for the account of the United States the port services required at each end of the route. The general agent "husbands" the vessel, consisting principally of victualing, supplying, maintaining and repairing, while the berth agent performs "port services," consisting principally of arranging for the handling and loading of cargo. At foreign ports, moreover, the berth agent, in addition to the cargo services, arranges for all husbanding services required.

Berth agents were generally chosen for routes over which they had previously operated vessels during peacetime and had developed organizations familiar with the local problems peculiar to such routes and the conditions of loading and discharge at their ports. They were appointed on the basis of their special competence for handling special routes. General agents were appointed on the basis of their experience in husbanding vessels. Many companies acted both as general agents and as berth agents but their functions only coincided where

vessels assigned to them as general agents were operated over routes assigned to them as berth agents. The delineation of the duties of general agents and berth agents is fully set forth in War Shipping Administration Operations Regulation No. 84,[1] but may be conveniently illustrated by an example. Thus assume that the A Steamship Company was designated general agent of the United States to husband a vessel, S.S. *Eks*. At the same time it was designated as berth agent of the United States for the New York to United Kingdom route over which it had been a peacetime operator. Thereafter the A Company would act as berth agent for any vessels, no matter what general agent might husband them, which operated on its route—both while the vessels were at New York and when they arrived in the United Kingdom. And it would do so again on their return to New York if the representative of the War Shipping Administration in the United Kingdom who had charge of rerouting directed the vessels to return to New York. When the *Eks* operated on that route, A Company, as general agent, would therefore render berth agency services to it without special designation as berth agent. Now assume the B Steamship Company was designated as berth agent for a route from the Gulf of Mexico to the United Kingdom. When the *Eks* was assigned to make a voyage to the United Kingdom from a port in the Gulf of Mexico, the B Company, the regular berth agent for that route, and not the A Company, the ship's husband, would act as berth agent for the vessel both in the Gulf of Mexico and on its arrival in the United Kingdom.

[1] The text of Operations Regulation No. 84, referred to, was attached and is printed *infra*, pp. 171–176 *et seq.*

And this even though the A Company, the general agent for the *Elks*, was acting as berth agent in the same port in the United Kingdom for vessels on its New York-United Kingdom route. In other words, although a general agent is acting as berth agent in the United Kingdom for vessels from United States North Atlantic ports, it will not act as berth agent for vessels arriving from a United States Gulf port even though the vessels should be among those assigned to it as general agent. Conversely, the B Company, acting as berth agent for the Gulf of Mexico-United Kingdom route, and not the A Company, the general agent, would perform the duties of husbanding the *Eks* in the United Kingdom.

The powers of general agents and berth agents were alike restricted when vessels entered the immediate war zone areas. In those cases the Government performed all such services either by the military authorities or by the War Shipping Administration's own foreign service representatives. (Organized under War Shipping Administration Administrative Order 2, Supplement 4, September 26, 1942, and 4A (Revised), see also Administrative Order 52, December 3, 1943.) At the height of operations, War Shipping Administration maintained a staff of 675 employees located in almost every foreign port in the world in which its vessels were operating. Operating regions, headed by a Regional Director reporting directly to the War Shipping Administrator, were set up to cover all foreign areas. Port representatives, port engineers, and, in some cases, supplemental administrative and legal personnel were assigned at important ports in such areas to carry out the functions of the War Shipping Administration. Foreign service

personnel was transferred from port to port as the war theatres changed and new fronts became active. Even at present, in Japan and Korea, no American steamship companies have been permitted to operate. The business of Government merchant vessels operating in those areas is still handled exclusively by the foreign service representatives of the Maritime Commission as successor to the War Shipping Administration, operating through the military authorities.

General agents were further restricted in the extent of their authority by the action of the Government in entering into master contracts for the procurement of various services and supplies required by general agents and berth agents for husbanding the vessels and affording them port services. Thus, master contracts for repairing, terminal operation, stevedoring, bunkering, and food stockpiling were entered into by the Government. (See pp. 408–583 of Document 4, Plaintiff's Exhibit 7.) All repairs to vessels under general agency agreements were performed under one of several types of repair contracts (pp. 408–496), which included both master contracts for principal repairs and special contract forms to be used by agents in contracting in the name of the United States for isolated repairs when repair contractors under master contracts were not available. Eventually, all oil bunkers and diesel fuels supplied were delivered to the master of the vessel pursuant to orders placed by the general agent on his requisition under contracts designated Warshipfuel and Warshipdiesel (pp. 550–554). A contract designated Warshipfood (pp. 556–564) was also prepared and executed in various ports to assure ade-

quate supplies of scarce foods for vessels. Similar arrangements were made in respect to towage services in various ports (Operations Regulation 27 and supplements).

Even in the absence of master contracts, the War Shipping Administration instructed agents in many respects as to the terms of the contracts they were authorized to make. In accordance with the agency agreements, the provisions of Legal Bulletin No. 1 (September 22, 1942) and General Order No. 42 (9 Fed. Reg. 4110), such contracts for vessel supplies and services were required to be executed in the name of the United States and agents were referred to in that capacity only. It is believed attention should be drawn to the provisions of certain Operations Regulations and their supplements, particularly Nos. 27 (Towage Contracts), 84 (Duties of Berth Agents, General Agents, and Agents), 97 (Bunker Oil Contracts), 99, Supplements 1 and 2 (Pilferage). While some of these regulations were issued subsequent to the date of Caldarola's injury, the procedures codified therein had been established at an earlier date. The close character of the control exercised over general agents and berth agents is further indicated by the duties assigned to the various units of the War Shipping Administration Division of Operations as indicated in Administrative Order No. 50 together with Supplements 1, 8, 13 and 17 thereto.

The most significant restriction on general agents is the lack of control over the masters and crews serving on vessels assigned to them which results from the requirement of Article 3A (d) that the master shall be the agent of the United States, not of the general agent, and in the exercise of his

duties in the navigation and management, has exclusive control over the vessel and its crew. General agents are thus confined to procuring the crews and serving as the channel of command between the War Shipping Administration and the master. In 1942, at the commencement of War Shipping Administration operations, collective bargaining agreements between the maritime unions and the steamship companies were continued in force in accordance with the so-called Statements of Policy of May 4 and May 12, 1942, signed jointly by representatives of the Administration and the unions (see War Shipping Administration Operations Regulation No. 1).[2] Subsequent changes in wages and working conditions were approved by the War Shipping Administration, and where required, by the War Labor Board, before being placed in effect by the Administration. Moreover, a Division of Maritime Labor Relations was created by Administrative Order 20 of June 10, 1942, for the purpose of handling labor relations problems arising in the course of operations and insuring the continuance of proper labor relations.

The relationship between the seamen and the vessel is brought home to them in such a way that they can never have any reasonable doubt that they were serving on United States-owned and operated vessels. The articles of employment signed by the seamen designate the United States as the owner of the vessel and the general agent as its agent. Thereafter he is directly supervised and controlled by the master throughout the entire course of the

[2] The text of Operations Regulation No. 1, referred to, was attached and is printed in the record in the *Fink* case, No. 360, this Term, at pp. 188–191.

voyage. A certificate of ownership as well as a copy of the articles is conspicuously posted on board and seamen are thus constantly aware that they are serving on a vessel owned and operated by the United States. Upon termination of the voyage wages are paid to members of the crew by the master in the presence of a Shipping Commissioner. Funds for the purpose are made available to the general agent by the Administration through deposit in the special joint bank accounts set up in the name of the agent "as general agent for the War Shipping Administration." These procedures inevitably brought home to the seaman his status was that of an employee of the United States.

It is believed that the above explanation of the roles of berth agents and master contracts and the status of masters and crews as employees of the United States shows that in their operations general agents clearly were not authorized to exercise the rights of an owner *pro hav vice* in manning, navigating and managing the vessels assigned to them. For your further assistance there is submitted with this letter a collection of official documents referred to herein so far as they are not included in Document 4 (Plaintiff's Exhibit 7).

CONCLUSION

It is believed that the foregoing explanation conclusively establishes the purpose of the War Shipping Administration in undertaking direct operation of its vessels by masters and crews subject exclusively to its control. The purpose appears to have been threefold: First, to retain for government shipping the right to invoke sovereign immunity from foreign and local inspection, regulation

and taxation; Second, to obtain for government shipping the freedom from strikes or labor stoppages which results from preserving the status of all seamen on War Shipping Administration vessels as government employees; Third, to insure the preservation of indispensable wartime secrecy by confining all litigation which might in any way involve the navigation and physical management of government vessels to the admiralty courts where necessary security measures could be applied. It is believed that the explanation further shows beyond the possibility of doubt that operation under the general agency and berth agency agreements, as carried out by the regulations and master contracts of the War Shipping Administration, was direct government operation, differing in every essential respect from the peacetime contract operations involved in cases such as *Quinn* v. *Southgate-Nelson Co.* and *Brady* v. *Roosevelt S. S. Co.*

Respectfully.

(Sgd.) WADE H. SKINNER,
General Counsel.

APPENDIX C

War Shipping Administration Operations Regulations No. 84 (Revised)

Pertaining to all vessels owned by or under charter to the War Shipping Administration

(Dry cargo and passenger vessels)

Subject: *Definition of duties of berth agents, general agents, and agents*

Operations Regulation No. 84, dated December 29, 1943, and Supplement No. 1 thereto, dated March 22, 1944, are consolidated and amended to read:

General Order No. 21, Supplement No. 4, prescribes a revised form of service agreement for Berth Agents, which requires the Berth Agent to account directly to the Administration, instead of to the Agent or General Agent with respect to accounts that have not been rendered to the Agent or General Agent, prior to January 1, 1944. Otherwise, the outstanding regulations defining the duties of the Berth Sub-Agents, Agents and General Agents will govern with respect to services rendered, prior to January 1, 1944. Effective January 1, 1944, the duties of the Berth Agent and the Agent or General Agent will be as follows:

(1) Unless otherwise directed by the Administration, the Berth Agent shall in all cases, for the account of the Administration:

(a) Book the cargo and expedite its delivery alongside ship. Issue or cause to be issued to ship-

pers customary freight contracts, and bills of lading in the form prescribed by the Administration, and prepare manifests and other cargo documents. Where appropriate, book passengers and issue or cause to be issued to passengers customary passenger tickets in the form prescribed by the Administration. Handle mails;

(b) Collect all moneys due the United States under the Berth Agency Service Agreement and deposit, remit or disburse the same in accordance with such regulations as the Administration may prescribe from time to time, and account to the Administration for all moneys collected or disbursed by it or its Agents;

(c) While the vessel is under assignment to the Berth Agent, appoint sub-agents at foreign and intermediate ports of call for the receipt or delivery of cargo or for orders, and, subject to the provisions of paragraphs (2), (3), and (4) hereof, appoint sub-agents at domestic ports;

(d) While under his assignment arrange entrance and clearance of vessel at all foreign ports, except as provided in paragraph 6 (a), including entrance at the first port of loading and clearance from the last port of discharge.

(e) Pay agency fees, port charges, and cargo expenses in foreign and domestic ports, including fees and expenses incurred pursuant to paragraph (6) where the Berth Agent has been appointed to act in such matters as the agent of the General Agent or owner, pursuant to paragraph (6) (b);

(f) Adjust and settle cargo claims in accordance with the provisions of Wartime Insurance Instructions No. 1, as amended.

(g) Make all necessary arrangements for the transit of canals, except the Panama Canal as provided for in paragraph (5) (b).

(h) The Berth Agent shall notify the Agent or General Agent in advance of any requirements peculiar to the trade which relate to the duties of the Agent or General Agent such as arrangements for dunnage, slings, fresh water, draft, etc., affecting the projected voyage in the service of the Berth Agent.

(2) Where the Agent or General Agent does not provide its own facilities in the United States port of loading or discharge, and when not otherwise directed or approved by the Administration, the Berth Agent shall for the account of the Administration:

(a) Receive and deliver the cargo, passengers and mail; provide and pay for stevedoring and other cargo handling expenses, port charges, wharfage and dockage, pilotage, commissions, and consular charges (except those pertaining to the master, officers and crew) and all other expenses in connection with the handling of the cargo, passengers and mail.

(3) Where the Agent or General Agent provides its own facilities in the United States port of loading or discharging, and when not otherwise directed by the District Director in charge of the port where the services are performed; the Agent or General Agent shall for account of the War Shipping Administration perform the duties provided in paragraph (2) of this regulation, but the Berth Agent shall have the right to employ a Head Receiving or Delivery Clerk to supervise the operation of receiving and delivering cargo.

(4) Where the Agent or General Agent and the Berth Agent both provide their own facilities in the United States port of loading or discharge, the duties provided in paragraph (2) of this regulation shall be performed for the account of the War Shipping Administration as directed by the District Director in charge of the port where the services are performed.

(5) Except as otherwise directed by the Administration, the Agent or General Agent for account of the War Shipping Administration shall, in all cases:

(a) Order and pay for fuel, after consultation with the Berth Agent, and follow such instructions with regard thereto as shall be issued by the Administration from time to time;

(b) Make all necessary arrangements for transit of the Panama Canal.

(6) Except as otherwise directed by the Administration, the owner or General Agent shall in all cases:

(a) Appoint sub-agents to handle the vessels' business, such as repairs, restowage of cargo, matters involving General Average, etc., and where the ship calls for orders between berth agency assignments.

(b) The War Shipping Administration requests that as far as practicable all General Agents use the sub-agents of the Berth Agents at foreign ports for the handling of the vessels' business, in addition to the cargo activities performed by such sub-agents for the Berth Agent. It is also deemed desirable that the same procedure be followed with respect to time chartered vessels and it is requested that Time Charter Agents ask the owners of all vessels time chartered to the Administration to use the sub-

agents of the Berth Agents at foreign ports in similar instances and to authorize the latter to reimburse the sub-agent for expenses properly incurred for the owner's account.

(c) In every case where, in accordance with paragraph (a) hereof, the foreign sub-agent of a Berth Agent is used, the Berth Agent hereby is authorized to reimburse the foreign sub-agent out of War Shipping Administration funds for any husbanding expenses incurred for such vessel which are for account of the War Shipping Administration and when so authorized by the owner in the instance of a time chartered vessel, for account of such owner. The Berth Agent shall submit to the General Agent or to the owner of the time chartered vessel, as the case may be, the invoices and other documents covering all such husbanding expenses and shall collect from them the amounts of such expenses. In the event the General Agent, or, in the instance of a time chartered vessel, the owner has reason to question or disapprove the payment of any particular item, same shall be referred by them to the Berth Agent for adjustment with the sub-agent. This provision is stipulated because of the General Agent's and owner's over-all responsibility for the husbanding of the vessel, although it is the purpose of this regulation to permit the Berth Agent promptly to reimburse foreign sub-agents for services rendered.

(7) The Berth Agent shall promptly notify the Agent or General Agent of all known deviations or intended deviations under the terms of the bill of lading or affreightment contract. It shall be the responsibility of the Agent to immediately transmit such notification to the owner of a vessel under time

charter. Upon receipt of such information the General Agent or owner shall promptly notify the P. & I. Underwriters, pursuant to policy requirements. Such exchanges or notifications shall be made pursuant to applicable provisions of War Shipping Administration security orders and regulations.

(8) All Agents, General Agents, and owners shall attend to matters in connection with Marine casualties and resulting claims in accordance with appropriate instructions issued by the Director, Division of Wartime Insurance.

G. H. HELMBOLD,
(Sgd.) G. H. Helmbold,
Assistant Deputy Administrator
for Ship Operations.